IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE APPELLEE

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GLOSSARY OF MILITARY LAW ABBREVIATIONS

AGN — Articles for the Government of the Navy (prior to 1951). R. S. § 1624; 34 U. S. C. [1946 ed.] § 1200.

AW — Articles of War for the year in question, as follows:

1775. Resolution of June 30, 1775, 2 J. Cont. Cong. 111.

1776. Resolution of Sept. 20, 1776, 5 J. Cont. Cong 788.

1806. Act of April 10, 1806, c. 20, 2 Stat. 359.

1874. R. S. § 1342.

1916. Sec. 3 of the Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 650.

1920. Ch. II of the Act of June 4, 1920, c. 227, 41 Stat. 759, 787; 10 U. S. C. [1926 through 1946 eds.] §§ 1471-1593.

1948. Title II of the Act of June 24, 1948, c. 625, 62 Stat. 604, 627; 10 U. S. C. [Supp. II to 1946 ed.] §§ 1471-1593.

BR — Holdings of Army Boards of Review, under AW 50½ of 1920. Multigraphed.

Bull. JAG — Bulletin of The Judge Advocate General of the Army, 1942 to 1951. A continuation of Supp. I to Dig. Op. JAG, 1912-1940, *infra*.

CMO — Court-Martial Orders, Navy Department.

CMR — Court-Martial Reports. A current series; Lawyers' Cooperative Publishing Co.

Dig. Op. JAG — Digest of Opinions of The Judge Advocate General of the Army. Published, *inter alia*, 1880, 1895, 1901, 1912, 1912-1940. Also Supp. I to the last, 1941.

MCM — Manual for Courts-Martial. Editions for the Army through 1928; for Army and Air Force in 1949; for all services in 1951.

UCMJ — Uniform Code of Military Justice. Act of May 5, 1950, c. 169, 64 Stat. 108; 50 U. S. C. §§ 551-736.

Winthrop — Winthrop, *Military Law and Precedents* (2d ed. 1896). References to original pagination are given as star pages [*]. References to "Reprint" are to the edition published by the War Department in 1920 "for the information of the service."

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OPINION BELOW

The oral opinion of the district court (R. 131-132) is not reported.

JURISDICTION

The judgment of the district court (R. 134) was entered on November 22, 1955. The notice of appeal to this Court (R. 135-136) was filed on December 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. § 1252.

On March 12, 1956, the Court ordered (R. 145) that "further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 123-125.

QUESTIONS PRESENTED

1. Whether the Superintendent of the District of Columbia Jail, who is appointed and removed by the Commissioners of the District of Columbia, is an officer or employee of the United States or of any agency thereof within the meaning of 28 U. S. C. § 1252 so as to be able to appeal directly to this Court, he being the only official person who is a party to the proceeding.

2. Whether, assuming the constitutionality of Article 2(11) of the Uniform Code of Military Justice, a person subject thereto as one "accompanying the armed forces of the United States without the continental limits of the United States" ceases to be so subject when, by affirmative act of the Government, she is returned to the United States and there placed in civilian custody.

3. Whether a civilian woman, the dependent wife of a non-commissioned officer in the Air Force, may constitutionally be tried by court-martial in time of peace and not in occupied territory.

STATEMENT

This is a habeas corpus proceeding brought by a woman who all her life has been a civilian, challenging the right of the United States Air Force to try her by court-martial at Bolling Air Force Base within the District of Columbia.

The essential facts are not in dispute.

In March 1953, appellee was living in Upper Heyford, Oxfordshire, England, with her two children and her husband, Master Sergeant Edward E. Covert, USAF. Appellee and the two children had been furnished Government transportation to England as Sgt. Covert's dependents, and were living with him in England in quarters furnished by the Government (R. 1, 6-7).

On March 10, 1953, appellee was under psychiatric treatment by a medical officer of the United States Air Force (R. 1, 21-22, 66-67, 100-101). On the night of March 10-11, while emotionally disturbed, and in a condition that some of the medical witnesses considered to involve psychosis and legal irresponsibility, appellee killed her husband (R. 1, 23-28, 68-75, 84-90, 98, 101-105). She then climbed into bed with his corpse and stayed there all night (R. 1, 23, 82).

Thereafter, purporting to act under authority of Art. 2(11), UCMJ, the Commander of the 7th Air Division, USAF, caused appellee to be tried by a general court-martial of the U. S. Air Force convened at RAF Station Brize Norton, Oxfordshire, England, on a charge of premeditated murder in violation of Art. 118(1), UCMJ (R. 1-2, 5).

Faced with a certificate by an Air Force Colonel that appellee was subject to military law under the Uniform Code of Military Justice, issued pursuant to the British Act of Parliament known as the United States of America (Visiting Forces) Act, 1942 (U. S. Br. 74-78), the British authorities relinquished jurisdiction (R. 128-131). Appellee was accordingly tried by court-martial, and on May 29, 1953, was convicted of premeditated murder, and was sentenced to life imprisonment (R. 2, 5).

On June 23, 1953, appellee was flown, in the custody of the U. S. Air Force, to the Federal Reformatory for Women situated at Alderson, West Virginia, and was there confined as a prisoner by virtue of said conviction,

beginning June 25, 1953 (R. 2, 12). Appellee was with child during the trial (R. 20, 95), and the child was born while she was a prisoner at Alderson (R. 2, 95).

On February 19, 1954, an Air Force Board of Review, acting under Art. 66, UCMJ, affirmed appellee's conviction, one member dissenting, in opinions (R. 12-95) reported at 16 CMR 465. The case then reached the Court of Military Appeals, by certificate of the Judge Advocate General, USAF, under Art. 67(b)(2), UCMJ (R. 7, 97), and also by a petition for grant of review on other issues, filed by appellee's counsel (R. 7, 98).

On June 24, 1955, more than two years after appellee's trial, the Court of Military Appeals, one judge dissenting, reversed the conviction in opinions (R. 97-121) reported at 6 USCMA 48 and 19 CMR 174. The basis of reversal was that two of the prosecution's expert witnesses, who had indicated in unsolicited post-trial affidavits that they had been hampered by an Air Force Manual in expressing their professional opinions (R. 142-145), had in fact applied that Manual too restrictively (R. 107-110). The Court of Military Appeals accordingly remanded the case "for rehearing or other action not inconsistent with this opinion" (R. 110, 95-96).

Thereafter, the Judge Advocate General, USAF, transmitted the record of trial and the Court of Military Appeals decision to the Commander, Headquarters Command, Bolling Air Force Base, Washington, D. C., "to order a rehearing if a rehearing is practicable", and on July 12, 1955, the latter officer ordered such a rehearing, i.e., a new trial pursuant to Art. 63, UCMJ (R. 8, 121-122).[1]

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[1] It was alleged in par. 9 of the petition for habeas corpus (R. 2), on the basis of a letter in counsel's possession, that the determination to retry appellee by court-martial was personally made on July 20 by former Air Force Secretary Harold E. Talbott. But, as counsel remarked at the hearing in the District Court after being served with appellant's return, "A number of underlings claim that honor." Tr. 4 (not printed).

Following this, on July 14, 1955, appellee was released from the Reformatory at Alderson, West Virginia, and was taken, in Air Force custody, to the District of Columbia Jail (R. 2, 8-9, 123). At her counsel's request, she was then transferred to St. Elizabeth's Hospital for observation (R. 2, 9, 124-128). Later, on September 23, 1955, she was returned to appellant's custody at the District of Columbia Jail (R. 2).

Appellee's second trial by court-martial, at Bolling Air Force Base, was scheduled for November 28, 1955 (R. 2, 8).

The present petition for habeas corpus (R. 1-4) was filed on November 17, and an order to show cause issued on the same day (R. 4-5). Appellant made return (R. 5-11), setting forth the entire military proceedings, including the transcript of trial by court-martial; the complete military record is now before this Court.[2]

After a hearing, Judge Tamm delivered his opinion from the bench (R. 131-132), holding appellee entitled to release, essentially on the basis that (R. 132) "a civilian is entitled to a civilian trial". He accordingly signed a judgment on November 22, 1955, releasing appellee on an appeal bond in the sum of $1000 (R. 134; see colloquy as to the amount of the bond at R. 133-134).

From that judgment, appellant took a timely appeal to this Court, citing 28 U. S. C. § 1252 (R. 135-136).[3] Appellee moved to dismiss or affirm. Consideration of that motion and the question of this Court's jurisdiction was, by order entered March 12, 1956, postponed to the hearing on the merits (R. 145).

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[2] Printed in part at R. 12-131, together with the stipulated addition to the record (R. 136-145), which contains the three post-trial affidavits considered by the Board of Review and the Court of Military Appeals.

[3] As appellant says, he had earlier taken an appeal to the United States Court of Appeals for the District of Columbia Circuit (U. S. Br. 27, n. 11). The effect of the last sentence of 28 U. S. C. § 1252 on the earlier appeal is discussed *infra*, p. 21, note 8.

SUMMARY OF ARGUMENT

I. The present appeal must be dismissed because appellant is not an officer or employee of the United States or of any of its agencies and therefore is not within the terms of 28 U. S. C. § 1252.

A. Appellant is an officer of the District of Columbia and not an officer of the United States. That distinction has been recognized by the courts, by the Government's law and accounting officers, and, preeminently, by the Congress, which in many sections of the United States Code has referred to both groups, thus indicating its settled conviction that the two categories are so far distinct as always to require separate mention.

B. Whatever may be its status in the law of municipal corporations, the definition of "agency" in 28 U. S. C. § 541 shows that the District of Columbia is not an "agency" of the United States for purposes of Title 28, U. S. C. This conclusion is fortified by other provisions of that Title which would be meaningless on any contrary assumption.

C. Granted that appellant is an agent of the United States for custodial purposes, so as to be able to bind the United States by any judgment entered against him, he still does not come within § 1252. Had Congress desired to include any agent of the United States in § 1252, it would have used apt language to that end, as it did in 28 U. S. C. § 1442(a)(1).

D. Other means were available to the United States to obtain prompt review here. It could have intervened in the district court and become a party. Alternatively, appellant could have appealed to the Court of Appeals and then sought certiorari before judgment there.

II. Assuming that the appeal lies, and assuming the constitutionality of Art. 2(11) insofar as it subjects to military law persons "accompanying the armed forces without the continental limits of the United States", such military

jurisdiction was lost when the Air Force returned appellee to the United States.

A. While military jurisdiction once attached through the service of charges survives the expiration of a soldier's enlistment or of an officer's tour of duty, any affirmative act of separation, by discharge or release to inactive status, even during the pendency of court-martial proceedings, destroys that jurisdiction, since it transfers the accused back to civilian status. The Air Force has recognized this elsewhere. Here jurisdiction over appellee was terminated on two grounds.

B. First, upon being placed in custody other than that of the armed forces, she was no longer subject to the Code. Arts. 2(7), 58(a), UCMJ. Whatever may be the status of discharged soldiers in military custody, the scheme of the Uniform Code makes it clear that, once a person without military status is placed in civilian custody, military jurisdiction ceases.

C. Since the Art. 2(11) jurisdiction is geographical, it follows that the Air Force's act in returning appellee to the United States destroyed the jurisdiction to retry her once her original conviction was set aside. This conclusion is in accord with older military rulings on the termination of a military jurisdiction limited in time or status.

III. A. *Toth* v. *Quarles*, 350 U. S. 11, simply reaffirms the traditionally accepted unconstitutionality of any legislative attempts to subject civilians to court-martial jurisdiction in time of peace. This was proclaimed by Winthrop, and by successive Judge Advocates General of the Army over a forty-year period, from 1866 through 1905 and 1906. Those authorities cannot fairly be charged with libertarianism, with lack of martial ardor, or with less than full devotion to the needs of the armed forces. Other military writers after the Spanish War shared those views.

B. Prior to 1916, American military jurisdiction over camp followers was always limited to those civilians who,

in time of war, accompanied the armies in the field. Moreover, the exercise of that jurisdiction was always strictly limited. Even close and direct functional connection with the Army made no difference; the post trader, who followed the sutler and preceded the post exchange, was held not amenable to trial by court-martial in time of peace. After the jurisdiction was extended, on the books in 1916 and in practice in 1941, the only cases coming before the civil courts did not, prior to the rulings presently under review, deal with the question now presented; they involved only cases of camp followers in war time, or in occupied territory where the war power was being exerted. The traditional jurisdiction that subjects to trial by court-martial civilians who accompany the armies in the field in time of war now set forth in Art. 2(10), UCMJ, is ample to the needs of the service and moreover conforms both to historical precedent and to constitutional limits.

C. In 1916 and again in 1950, when Congress extended court-martial jurisdiction to cover civilians accompanying the armed forces overseas in time of peace, it was not advised of the earlier rulings; no one even suggested a constitutional question; and the considerations now advanced, based on world events and American military commitments, were, as the legislative history on both occasions demonstrates, not articulated by anyone.

D. Except in a purely rhetorical sense, dependent wives are no more a "part" of the armed forces abroad than they are in the United States. For 175 years, from 1775 to 1950, no dependent wife was ever placed on trial before an American court-martial. The dictum in *Madsen* v. *Kinsella*, 343 U. S. 341, is valueless as a precedent since the camp-follower issue was not contested there. Since even functional connection with the forces is insufficient to establish military jurisdiction, as the instances of contractors and post traders show, plainly there can be no military jurisdiction over dependent wives. They are simply not a "part" of the forces, regardless of what military

emoluments and amenities they enjoy; their relationship to the forces abroad does not differ in that or in any other respect from their relationship to the forces at home. Precedent and logic alike join in denying that marriage to a soldier makes a woman a "part" of the Army.

E. The power to try civilians by court-martial in occupied territory rests on the war power and on a statute giving general courts-martial the powers of military government tribunals, and so cannot justify such trials in non-occupied territory.

Even in domestic territory, the war power is "a power to wage war successfully", and so it justifies acts at home that could not possibly have been valid in time of peace.

The war power is also the source of the authority to deal with occupied territory; the United States is in such territory by right of conquest, and not, as in this case, with another nation's consent. Moreover, when the United States occupies enemy territory, Americans with property there are not entitled to compensation for its seizure, and are moreover subject to non-jury trial by the tribunals of American military government, which are enforcing foreign law.

Since 1916, a general court-martial has had all the powers of a military government court when it sits in occupied territory; this is the provision underlying the dictum in *Madsen* v. *Kinsella*, 343 U. S. 341, which asserts the concurrent jurisdiction of courts-martial. The military trial of civilians in occupied territory is thus an exercise of the war power, not of the power to govern the armed forces. The latter power can be exerted anywhere and at any time—provided its exercise is limited to the armed forces.

F. Nothing in the Fifth Amendment enlarges the grant of power to govern the armed forces. It was long thought that the Amendment was a source of military jurisdiction over non-military persons, and that the only inquiry was

whether a particular case was one "arising in the land and naval forces." But this easy assumption was exploded by *Toth v. Quarles*, 350 U. S. 11, 14. It is plain that nothing in the first ten Amendments could possibly be a grant of power. And independent research into the history of the Bill of Rights confirms the correctness of this Court's interpretation in *Toth*.

G. The power to govern the armed forces does not become broader simply because exercised outside the three-mile limit. Whether *In re Ross*, 140 U. S. 453, which stated in 1891 that the Constitution did not operate abroad, and which upheld a non-jury trial by a consular court in the Orient, is still law today, presents an interesting question. The trend since then has been markedly in favor of extending both constitutional guarantees as well as constitutional powers. It would seem that, if constitutional grants of power are deemed available for export, the Bill of Rights should not and does not stop at the water's edge.

But decision on this point is not necessary, for the reason that appellee was not tried by a consular court. She was tried by court-martial, which draws its jurisdiction from the power to govern and regulate the armed forces. That power does not cover dependent wives in time of peace. It is therefore not enlarged because sought to be exercised outside the continental limits of the United States.

H. Disciplinary considerations underlying the court-martial power do not extend to dependent wives, as 175 years of history demonstrate. And the arguments based on foreign relations, now advanced to subject wives to trial by court-martial, simply do not square with the facts.

The United States now has overseas many thousands of civilian employees of agencies other than the Department of Defense, and those employees are likewise accompanied by dependents. If the maintenance of international harmony justifies subjecting Department of Defense civil-

ians and dependents to military trials, why not those others too? They stand on the same footing so far as potential international friction is concerned.

If dependent wives are subject to military trial, then so are dependent children—but the Uniform Code lays down no test for the criminal amenability of dependent children.

Finally, the problem of offenses committed by accompanying civilians is a very small one. Such cases make up less than one half of one per cent of the Court of Military Appeals' business. And only six civilians—two of whose cases are now before this Court—have ever been convicted by court-martial of offenses serious enough to warrant their incarceration in federal civilian penal institutions.

The result is that, howsoever the problem is approached, the power to make rules for the government and regulation of the land and naval forces is not a power to govern or regulate the wives of members of those forces.

IV. The treaty power is completely irrelevant in the present case.

A. The invocation of the treaty power is an afterthought. That argument is not raised by the pleadings. The legislative history of Art. 2(11) establishes that Congress proceeded on the basis that it was reenacting existing military law in slightly different and more generalized form, and that it added the "Subject to" clause in order to avoid possible interference with the territorial jurisdiction of other countries. That clause, plainly, is one of limitation; it is not, and was not intended as, a grant of power. And the practice under Art. 2(11) shows that the jurisdiction thereunder has been exercised without reference to the terms of agreements with other nations.

B. The text of Section 2(1) of the British Parliament's United States of America (Visiting Forces) Act, 1942, shows that it did not purport to enlarge the jurisdiction of

American courts-martial, but in fact contracted it, so as to exclude British subjects who would otherwise literally fall within the terms of AW 2(d). The "Subject to" clause of Art. 2(11), UCMJ, reflects and accepts this contraction.

C. Even on the assumption *arguendo* that more can be drawn from the British statute than appears in its text, appellant still fails, since no exercise of the treaty power could possibly authorize the trial of this civilian appellee by court-martial within the District of Columbia. For the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

V. To the extent that appellant's invocation of the Necessary and Proper Clause brings the matter into the realm of judgment, examination of the realities of trial by court-martial demonstrates that the principle of "the least possible power adequate to the end proposed" is one preeminently applicable to the scope of military jurisdiction.

A. There is no need in fact to try dependent wives by court-martial in time of peace, as 175 years of experience show. To the extent that American civilian employees and dependents abroad commit offenses against foreign nationals, they are now triable in foreign courts. The actual figures show that the number of serious offenses committed by such civilians against Americans is very small, and for those few instances Congress can provide for trial in United States district courts. Principle and experience combine to establish the practicability of such a proposal; considerations of expense are of course inadmissible where the protection of constitutional rights is at stake.

B. Subjecting civilians to military jurisdiction in time of peace not only deprives them of their right to trial by jury, but necessarily cuts off other constitutional protections. They have no right to bail at military law, and decisions of the Court of Military Appeals reflect, by com-

parison with the standards applied in Article III courts, a substantial dilution of Fourth, Fifth, and Sixth Amendment protections.

C. The reasons that justify curtailment of individual rights of servicemen on the basis of fundamental distinctions between a military and a civilian society are wholly inapplicable to civilians who accompany the armed forces overseas in time of peace. Factors that justify restraints and restrictions to "govern armies of strong men" simply can not support similar treatment of dependent wives.

D. Even with the ameliorations introduced under the Uniform Code of Military Justice, military law, in actual practice, is still an essentially rough-hewn system, as a review of decisions of the Court of Military Appeals demonstrates. Examination of the conditions disclosed by those decisions shows that there are no persuasive reasons for subjecting to that system civilian women who happen to be married to servicemen.

E. The record of trial in the present case bears eloquent witness against the extension of military jurisdiction over civilian dependents. The wooden refusal of the Board of Review to give any weight to the recantation of the prosecution's expert witnesses, the way in which those witnesses' professional opinions were affected by a service manual, and, above all, the savage sentence imposed on a distraught and emotionally disturbed woman, so disproportionate when compared with sentences adjudged for the converse situation of unquestionably sane airmen killing a civilian, all emphasize the utter inappropriateness of turning over to an armed force the dispensing of justice to unarmed women.

The field of court-martial jurisdiction is accordingly preeminently one that calls for application of the principle of limitation to "*the least possible power adequate to the end proposed.*" *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Toth* v. *Quarles*, 350 U. S. 11, 23; *Cammer* v. *United States*, 350 U. S. 399, 404.

ARGUMENT

Mindful of Rule 16(4), appellee addresses herself at the outset to the question of this Court's jurisdiction to entertain the present appeal (R. 145).

I. THE PRESENT APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION, BECAUSE APPELLANT IS NOT AN OFFICER OR EMPLOYEE OF THE UNITED STATES OR ANY OF ITS AGENCIES, AND THEREFORE DOES NOT COME WITHIN 28 U. S. C. § 1252.

The Court has no jurisdiction of this appeal for the reason that appellant is only an officer or employee of the District of Columbia, and consequently does not come within the requirement of 28 U.S.C. § 1252, viz., in order to authorize a direct appeal thereunder, it is necessary that "the United States or any of its agencies, or any officer or employee thereof" be a party to the cause.

There is no question concerning the other requirements of § 1252—this is a civil action, being a habeas corpus proceeding; and Art. 2(11), UCMJ, was held unconstitutional by the district court, certainly as applied to this appellee. The sole inquiry is whether appellant falls within the quoted portion of § 1252.

A. Appellant is an Officer of the District of Columbia and Not an Officer of the United States

As the caption of this case shows, appellant is Superintendent of the District of Columbia Jail. The holder of that office was formerly appointed and removed by the Commissioners of the District upon recommendation of the Board of Public Welfare (D. C. Code [1951 ed.] §§ 24-409, 24-411), but, since the reorganization of the District of Columbia Government, he is now subject to the supervision of the Director of the Department of Corrections, who in turn is appointed by the Commissioners. See Reorganization Order No. 34, Appendix to Title 1 of Supp. III to D. C. Code, 1951 ed., p. 34.

It follows that appellant as Superintendent of the District of Columbia Jail is an officer of the District of Columbia and not an officer of the United States.

That distinction, which stems from the lack of identity between the United States and the municipal corporation known as the District of Columbia, the latter enjoying none of the general government's immunities (*Barnes* v. *District of Columbia*, 91 U. S. 540; *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1; *District of Columbia* v. *Woodbury*, 136 U. S. 450), has been recognized in a great variety of situations.

Thus, the courts have held that officers of the District of Columbia are not officers of the United States. *Griffith* v. *Rudolph*, 54 App. D. C. 350, 298 Fed. 672; *Donovan* v. *United States*, 21 C. Cls. 120; *Bundy* v. *United States*, 21 C. Cls. 429.

So have the Government's law and accounting officers. 29 Op. Atty. Gen. 410; 22 Op. Atty. Gen. 59; 13 Comp. Dec. 262; 13 Comp. Dec. 533.

And, preeminently, the Congress, in many, many sections of the United States Code, has, by referring to both officers and employees of the United States and to those of the District of Columbia in the same clause, indicated its settled conviction that the two groups are wholly distinct and therefore require separate mention. The listing that follows must be regarded as representative rather than exhaustive: Title 5, §§ 17b, 30n, 59a, 61a-1(a), 61g, 83, 84a, 794, 901(a), 914, 942(b), 942b, 944, 955, 958, 2061(a); Title 10, §§ 371, 371a; Title 14, § 761; Title 26, §§ 3401(c), 3404, 4772(b); Title 28, § 1823(b); Title 32, §§ 75, 76; Title 50 Appendix, §§ 459(b)(A), 1472(a)(A), 1474.[4]

Appellant simply cannot qualify as an officer or employee of the United States.

[4] The reference in each instance is to the Code provision as amended through the close of the 1st Session of the 84th Congress.

B. The District of Columbia is Not an Agency of the United States for Purposes of Title 28, U. S. Code.

Appellant next argues (U. S. Br. 15-20) that, conceding the District of Columbia to be a distinct municipal corporation, it is none the less an "agency" of the United States.

True, for many purposes, and in a broad sense, every municipal corporation is an agency of the higher sovereignty by which it was created. E.g., *Trenton* v. *New Jersey*, 262 U. S. 182. And, as in the Legislative Reorganization Act of 1949 (5 U.S.C. § 133z-5), Congress may, by express definition, treat the District of Columbia as a federal "agency." But the question here cannot be disposed of by generalization or by resort to inapplicable statutory definitions.

The term "agency" is expressly defined, for purposes of Title 28 of the United States Code, so as to exclude the District of Columbia.

Section 451 of Title 28 provides in pertinent part:

> "As used in this title: * * *
> "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

It would be difficult to conceive of a more comprehensive definition that so very plainly excludes the District of Columbia. And so it has been held that the District of Columbia does not qualify as a "federal agency" under the Tort Claims Act, which is a part of Title 28 (28 U.S.C. §§ 2671 et seq.). *Douffas* v. *Johnson*, 83 F. Supp. 644 (D.D.C.).

Appellant cites 18 U.S.C. § 6, defining "agency" just as 28 U.S.C. § 451 does, and relies on *United States* v. *Bramblett*, 348 U.S. 503, which interpreted the former provision in broad terms (U.S. Br. 17-18).

It is of course true, as the revisers' notes to 28 U.S.C. § 451 show, that its definition of "agency" was intended to conform to the same definition contained in 18 U.S.C. § 6. But the *Brambletl* case affords appellant no help here, for the obvious reason that the Court was not there concerned with the status of the District of Columbia. What was said in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133, apparently still needs periodic repetition: "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."

Other statutory provisions fortify the conclusion that the District of Columbia is not an agency of the United States for purposes of Title 28.

Thus, 28 U.S.C. § 1825 provides that fees and mileage need not be tendered to a witness upon service of a subpoena "issued in behalf of the United States or an officer or agency thereof." But 11 D. C. Code § 1521 provides that the disbursing officer of the District of Columbia may advance sums to be used for the payment of witness fees. If the District of Columbia were an agency of the United States, there would obviously be no need to provide for advancing witness fees.[5]

And 28 U.S.C. § 1823(b) provides that "Employees of the United States or an agency thereof in active service called as witnesses on behalf of the District of Columbia in any judicial proceeding in which the government of the District of Columbia is a party" shall not be paid witness fees. If, as appellant argues, the District of Columbia is an agency of the United States within Title 28 U.S.C., the quoted language would be redundant nonsense.

[5] It should be noted that the D. C. Code provision referred to survived the complete integration of the superior courts of the District of Columbia into the federal judicial system that was effected by Sections 135-142 of the Act of May 24, 1949, c. 139, 63 Stat. 89, 108-110, that swept away so many differentiations formerly peculiar to the District of Columbia.

C. The Circumstance That Appellant Was an Agent of the United States in the Present Case Does Not Bring Him Within 28 U. S. C. § 1252

Appellant argues at some length (U.S. Br. 20-26) that he was an agent of the United States in his capacity as Superintendent of the District of Columbia Jail.

It is not disputed that appellant is "a custodial agent of the United States" (U.S. Br. 20), or that he was an "agent of the United States in respect to [appellee's] safekeeping" (U.S. Br. 23), or that he was the "keeper of the United States" (U.S. Br. 24), or that he was "an agent for the Air Force" (U.S. Br. 25).

But these concessions still do not bring appellant within 28 U.S.C. § 1252. That section does not mention agents or keepers; it speaks only of "any officer or employee." However much appellant may be acting on behalf of the United States for custodial purposes, he simply does not qualify under the statutory language so as to be able to prosecute a direct appeal of this Court.

If Congress had desired to include within § 1252 any person who was merely an agent of the United States, without being either an officer or employee thereof, it could—and undoubtedly would—have used apt language to that effect.

Thus in 28 U.S.C. § 1442(a)(1), the provision for removal of state criminal prosecutions covers "Any officer of the United States or any agency thereof, *or person acting under him* * * *." [Italics added.] See *People of State of Colorado* v. *Maxwell*, 125 F. Supp. 18 (D. Colo.), motion for leave to file petition for prohibition or mandamus denied, *sub nom. State of Colorado* v. *Knous*, 348 U. S. 941.

Undoubtedly, appellant in this case is a "person acting under" the officers of the Air Force who desired him to confine appellee (R. 123). Appellant may, for many purposes—though hardly in this case—be acting as an agent

of the Attorney General. But the question here concerns not § 1442(a)(1) but § 1252, and the latter provision does not contain the "person acting under" clause.

Nor does it follow, as appellant now urges (U. S. Br. 26), that unless he is held to be within the statute "it would appear difficult to find a basis for holding the United States or any of its officers bound by the decision below."

As the cases cited by appellant show (U. S. Br. 24-25), he was "the keeper of the United States." That is sufficient to bind the United States. Appellant can still be an agent of the United States, capable of binding the United States, even though he is not entitled to take a direct appeal under 28 U.S.C. § 1252.

Thus, Gillies, of *Von Moltke* v. *Gillies*, 332 U. S. 708, though only a state official—he was Superintendent of the Detroit House of Correction—was an agent of, and the keeper of, the United States, acting under the direction of the Attorney General. But those facts could not bring him within the terms of a precisely and rather narrowly drawn jurisdictional provision. If, on Mrs. Von Moltke's petition for habeas corpus, the statute under which she was being held had been declared unconstitutional, it is plain that Gillies, although undoubtedly an agent of the United States, could not have qualified under § 1252 so as to be able to prosecute a direct appeal.

D. Other Means Were Open to Appellant to Obtain Prompt Review of the Constitutional Issues Involved in This Case

Appellant argues (U. S. Br. 15) that the manifest purpose of 28 U.S.C. § 1252 and of its predecessor provision (Sec. 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 752) was "to afford the United States Government as a whole an opportunity for prompt review of constitutional issues".

No one old enough to have lived through the constitutional crisis of the mid-1930s will ever dispute that. But

the statute invoked, and the law now in force, make ample provision for such prompt review.

First: To preclude the possibility of significant constitutional litigation to which the United States will not be a party, Congress provided, in 28 U.S.C. § 2403, for the United States' right of intervention, so as to confer upon it all the rights of a party to the cause. This provision, drawn from Sec. 1 of the same Act of August 24, 1937, seems to have been primarily occasioned—if one can properly point to a single incident—by the notorious and essentially collusive case of *In re American States Public Service Co.*, 12 F. Supp. 667 (D. Md.), affirmed *sub nom. Barco, Inc.* v. *Whitworth*, 81 F. 2d 721 (C.A. 4), certiorari denied, 297 U. S. 724.[6] But in the present litigation, the United States did not choose to intervene, although appellant was represented by the United States Attorney below (R. 11, 136).

Second. Even without intervention by the United States, there was available to appellant a swifter method for obtaining prompt review of the obviously important constitutional question involved in this case: He could have perfected the appeal he had earlier taken to the Court of Appeals (U. S. Br. 27, n. 11), and then filed, prior to judgment, a petition for writ of certiorari here. 28 U.S.C. § 1254(1); this Court's Rule 20. That was the course successfully pursued by the petitioner in No. 713, *Kinsella, Warden, etc.* v. *Krueger*,[7] where, moreover, the warden had been the prevailing party in the district court.

Adequate remedies having been available to obtain more timely review, considerations based on the desirability of such quicker review cannot properly be invoked to torture the plain language of 28 U.S.C. § 1252.

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[6] For a contemporaneous account of the history of the 1937 Act, see Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 610 *et seq.*

[7] Petition for certiorari filed February 27, 1956, and granted March 12, 1956.

It follows from what has been said under the present heading that this appeal must be dismissed for want of jurisdiction.*

The remaining portions of the brief deal with the merits on the assumption, made for purposes of argument, that the present appeal lies.

II. ASSUMING THAT APPELLEE COULD CONSTITUTIONALLY HAVE BEEN TRIED BY COURT-MARTIAL IN ENGLAND AS A PERSON "ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES WITHOUT THE CONTINENTAL LIMITS OF THE UNITED STATES," SHE CEASED TO BE SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE AFTER THE AIR FORCE RETURNED HER TO THE UNITED STATES AND PLACED HER IN CIVILIAN CUSTODY, AND CONSEQUENTLY SHE COULD NOT THEREAFTER BE RETRIED BY COURT-MARTIAL.

Inasmuch as appellee may rely on any ground disclosed by the record to support her judgment, whether or not those grounds were accepted by the court below (e.g.,

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* Appellant's comments (U. S. Br. 27, n. 11) on his earlier appeal to the United States Court of Appeals for the District of Columbia Circuit should be brought up to date; on April 12, 1956, that court granted his motion for an extension of time.

Appellee respectfully submits that this action disregarded the relevant last paragraph of 28 U. S. C. § 1252, *infra*, p. 124, which reads:

> "A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. *All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.*" [Italics added.]

It was on the basis of the italicized sentence—nowhere referred to by appellant—that appellee contended, properly it is submitted, that there was nothing before the Court of Appeals, and that the statute precluded her simultaneous harassment by two appeals in two different courts.

Appellant's further suggestion (U. S. Br. 27, n. 11) that, having mistaken his remedy, the Court should now treat his Statement as to Jurisdiction herein as a Petition for Certiorari, overlooks the circumstance that 28 U. S. C. § 2103 applies only to appeals from state courts, and consequently does not permit such a course here.

Ex parte Scofield, 308 U. S. 415; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185), and because this Court will, as a matter of traditional practice, refrain from deciding constitutional questions when the record discloses other grounds of decision (e.g., *Neese v. Southern Railway Co.*, 350 U. S. 77), appellee turns at the outset of her discussion of the merits to the non-constitutional ground in the case, which was duly put forth in her petition for habeas corpus (¶ 12*a*, R. 2-3). As there stated,

> "If it be assumed that Art. 2(11), UCMJ, ever validly conferred jurisdiction on the United States Air Force to try relator as a person 'accompanying the armed forces without the continental limits of the United States,' then such jurisdiction terminated after relator's conviction was set aside, and she was held within the continental limits of the United States, not in the custody of the armed forces, but in three separate civilian institutions * * *."

A. While Military Jurisdiction Once Attaching Survives Expiration of a Term of Enlistment or of a Tour of Active Duty, It Is Destroyed When the Government by Affirmative Act Discharges or Separates the Individual Concerned

It cannot be doubted that, when military jurisdiction attaches, through the preferring of charges, such jurisdiction is not lost because, pending trial or in the course of the proceedings, the soldier's term of enlistment expires. *Walker v. Morris*, 3 Am. Jurist 281 (Mass.); *In re Bird*, 2 Sawy. 33, Fed. Case No. 1428 (D. Ore.); *Barrett v. Hopkins*, 7 Fed. 312 (C.C.D. Kan.); Winthrop, *118-120 (reprint, pp. 90-91); Dig. Op. JAG, 1912, p. 511, ¶¶ VIII D 1, D 2.

Similarly, where jurisdiction has attached in the case of an officer, it will not be defeated by the expiration of his tour of duty (Dig. Op. JAG, 1912-1940, p. 164, last three subparagraphs of ¶ 359(6)) or by the termination of his commission by operation of law (*United States v. Sippel*, 4 USCMA 50, 15 CMR 50).

But the situation is wholly different where, by affirmative act of the Government, the soldier or officer against whom charges are pending is duly separated, discharged, or mustered out; in that event the military jurisdiction ceases, because after separation the individual is once more a civilian. Winthrop, *116-118 (reprint, p. 89); Dig. Op. JAG, 1912, p. 514, ¶ VIII 1 1; Dig. Op. JAG, 1912-1940, pp. 162-163, ¶ ¶ 359(1), 359(2). And the same consequence follows where such separation takes place after he has been tried but before the proceedings have been approved. 5 Bull. JAG 35, ¶ 359(6); 5 Bull. JAG 278, ¶ 407(3).

As Winthrop put it (*118; reprint, p. 89), "the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community."

And, collecting rulings over a long period, the 1912 Digest of Opinions of The Judge Advocate General of the Army stated (p. 514, ¶ VIII 1 1):

> "An officer or soldier * * * ceases to be amenable to the military jurisdiction, for offenses committed while in the military service, after he has been separated therefrom by resignation, dismissal, being dropped for desertion, muster out, discharge, etc., and has thus become a civilian."[9]

This principle was applied in cases involving separations after both World War I (Dig. Op. JAG, 1912-1940, pp.

[9] The original text notes an exception with respect to the recapture clause of AW 60 of 1874 (identical with that in AW 94 of 1916 through 1948 and in AGN 14 (Eleventh); narrower in scope of offenses covered than Art. 3(a), UCMJ, but identical in substance). In view of the holding in *Toth* v. *Quarles*, 350 U. S. 11, that qualification is of course no longer valid.

162-163, ¶359(1), 359(2)) and World War II (5 Bull. JAG 35, ¶359(6); 5 Bull. JAG 278, ¶407(3)).

In 1946, The Judge Advocate General ruled (5 Bull. JAG 35, *supra*) that "court-martial jurisdiction ceases over military personnel upon honorable discharge or upon transfer to reserve components.[10] In the case of officers of the Army of the United States, such jurisdiction ceases upon their being placed on an inactive status. The mere preparation of charges against an officer of the Army of the United States prior to his being placed on inactive status would not be sufficient to continue court-martial jurisdiction over him as to the offenses therein charged."

And in the case of *United States* v. *Lt. Murray*, 62 BR 35; 5 Bull. JAG 278, ¶407(3),[11] where the accused, following his trial and sentence to dismissal but prior to confirmation of such sentence, was released from active duty and separated from the service, The Judge Advocate General advised the Under Secretary of War that the proceedings must be treated as abated. He said (62 BR at 39 [Oct. 14, 1946]):

> "The Board [of Review] expresses the opinion that the release of accused from active duty effected constructive or implied remission of the sentence previously adjudged and that the sentence may not now be legally carried into execution. I concur in that opinion and recommend that the proceedings be treated as having been abated and that no further action be taken by way of exercise of the confirming power or publication of the proceedings in a general court-martial order."

The foregoing rulings, although duly cited in appellee's Motion to Dismiss &c. at p. 13, are neither referred to nor

[10] With a stated exception as to AW 94; see comment in the preceding note.

[11] This case was traced to the Board of Review opinions through its court-martial number; the digested holding in 5 Bull. JAG 278 does not appear to be wholly complete.

answered by anything in appellant's brief. Appellee's view that they are unanswerable is confirmed by the circumstance that the Air Force was fully aware of those rulings, and, except in the present case, governed itself accordingly; this is graphically demonstrated by the case of *United States* v. *Sippel*, 4 USCMA 50, 15 CMR 50.

There an officer's conviction and sentence to dismissal had been affirmed by a Board of Review. Later, pending action by the Court of Military Appeals on his petition for grant of review, his commission expired by operation of law at midnight, April 1, 1953. The accused was advised that his pay would stop after that day and that he would have no duty assignment, but (p. 53) "that no written orders of separation, discharge, or release from active duty would be issued to him." When he protested, asserting that this was an attempt to effect a premature forfeiture of pay and allowances, he was advised (*id.*) "that an order relieving an officer from active duty is an administrative act which terminates the active duty status of an individual; and that such an order was not issued to the accused, nor to others in similar circumstances, because it was believed that any affirmative administrative actions might abate the proceedings pending against them."

Thus the Air Force did not suppose that "its intent and purpose to continue to assert jurisdiction" (U. S. Br. 72) would be proof against an affirmative act of separation on its part. For, plainly, under the ruling in Lt. Murray's case (*supra*, p. 24), and under the consistent course of military decision, any affirmative act by the Air Force would have destroyed jurisdiction to proceed further in Col. Sippel's case.

It follows that the language found in some of the expiration of enlistment cases (e.g., *Barrett* v. *Hopkins*, *supra*, 7 Fed. at 315, cited at U. S. Br. 66), to the effect that juris-

diction cannot be divested "by any subsequent change in the status of the accused," is far too broad.[12]

Where the apparent change of status is the result of an escape, then jurisdiction is not lost. *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. An accused may not benefit from his own wrong. But there was no escape here; all of appellee's movements after her initial arrest and confinement in March 1953 (R. 3, ¶13) were involuntary.

On the assumption under the present heading that appellee was properly subject to the Uniform Code while in England as a person "accompanying the armed forces of the United States without the continental limits of the United States" (Art. 2(11), UCMJ), she was, by affirmative act of the Air Force, separated from further military jurisdiction in two aspects:

First, when she was placed in civilian custody, as distinguished from that of the armed forces, she was outside the terms of Art. 2(7), UCMJ.

Second, when she was returned to the United States, she was no longer within the terms of Art. 2(11), UCMJ.

True, as long as her conviction remained in force, she was, under the present assumption, properly confined. *Ex parte Ortiz*, 100 Fed. 955 (C.C.D. Minn.); cf. *United States* v. *Chambers*, 291 U. S. 217; *Massey* v. *United States*, 291 U. S. 608. Therefore it does not follow, as appellant seems to think (U. S. Br. 70), that a valid exercise of jurisdiction under Art. 2(11) would be defeated by execution, in accordance with Art. 58, of a sentence duly affirmed.

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[12] For dramatic illustrations of the effect of a change of status on military jurisdiction, see *United States* v. *Cook*, 336 U. S. 210, and *Toth* v. *Quarles*, 350 U. S. 11. True, the discharges there preceded the preferring of charges, but, in view of the unbroken line of rulings, *supra*, pp. 23-25, as to the effect of a discharge on pending charges, the ultimate result could not have been different in either of the cited cases.

Similarly, if appellee had retained a military status, the setting aside of her conviction would not have divested jurisdiction (cf. U. S. Br. 66). But here, when that conviction was set aside, she was no longer within the terms of the Uniform Code, for the two reasons just stated, which will be discussed in order.[13]

The foregoing is not varied by the circumstance that a rehearing at military law is, as appellant correctly states (U. S. Br. 67-68), a continuation of the original proceeding. Appellee freely admitted this below.[14] But, as the termination-of-jurisdiction rulings show, *supra* pp. 23-24, and as the Air Force recognized in the *Sippel* case, *supra*, p. 25, an affirmative separation at any stage of the proceedings has always been recognized as effective to destroy further military jurisdiction.

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[13] It may be asked why, if the assertion in the text is true, appellee did not seek release by habeas corpus the moment her conviction was reversed by the Court of Military Appeals. The answer is that, under Art. 3(a), UCMJ, which at that time was valid within the District of Columbia (*Talbott* v. *United States ex rel. Toth*, 215 F. 2d 22), the Air Force could have reasserted military jurisdiction. That obstacle was not removed until this Court reversed the D. C. Circuit on November 7, 1955 (*Toth* v. *Quarles*, 350 U. S. 11). The present proceeding was filed just ten days later (R. 1).

[14] "The Court [Tamm, J.]: What then do you say to the Government's statement that the conviction has not been set aside in their decision and that the term 'rehearing' does not constitute a new trial but is rather a continuation of the preceding trial.

"Mr. Wiener: I agree that it is a continuation of the preceding trial. It is like any case here, your Honor. If someone is indicted and tried in this court and the Court of Appeals sets aside the conviction and the defendant is retried, that is a continuation of the existing proceeding.

"But I say that it makes no difference because the Army has held that where the man has been tried and he is separated pending approval of the proceedings, jurisdiction is gone. I am perfectly prepared to concede that it is one proceeding." Tr. 10 (not printed).

B. Persons Convicted by Court-Martial and Then Placed in Civilian Custody Are Not Subject to Military Law

In view of the reliance placed by appellant on cases involving military prisoners (U. S. Br. 70-71), it may be helpful to review briefly the course of legislation and decision dealing with court-martial jurisdiction over such persons.

By way of preliminary, it should be stated that there are military penal and correctional institutions, under the jurisdiction of the several armed forces (e.g., 10 U.S.C. §§ 1451, 1453-1458; 34 U.S.C. § 605), which are wholly separate from the federal civilian prison system administered by the Attorney General (18 U.S.C. §§ 4001 *et seq.*).

1. R. S. § 1361 (which derived from Section 12 of the Act of March 3, 1873, c. 249, 17 Stat. 582, 584, as amended by the Act of May 21, 1874, c. 186, 18 Stat. 48) provided that inmates of the Military Prison at Fort Leavenworth undergoing sentence of court-martial should be liable to trial by court-martial for offenses committed during said confinement. Since any military prisoner who had been dishonorably discharged from the service became, in consequence of such discharge, once more a civilian, Winthrop (*144-146; reprint, pp. 105-107) and successive Judge Advocates General maintained that, as applied to such prisoners, R. S. § 1361 was unconstitutional (Dig. Op. JAG, 1901, p. 294, §§ 1033-1034; *id.*, 1895, pp. 326-327, ¶8; *id.*, 1880, pp. 212-214, ¶8).

Notwithstanding rulings to the contrary (*Ex parte Wildman*, Fed. Case No. 17,653a (D. Kan.); 16 Op. Atty. Gen. 292), the military lawyers were unconvinced: "With these opinions the Judge Advocate General's Office has never been able to concur, and a recent ruling made by the acting Judge Advocate General to the effect that discharged soldiers held as convicts at the Military Prison, being civilians, were not amenable to trial by summary courts, was concurred in, and action directed accordingly, by the Major

General Commanding, July 5, 1892." Dig. Op. JAG, 1895, p. 327.

2. Shortly thereafter, however, R. S. § 1361 was again sustained, *In re Coy*, 70 Fed. 969 (C.C.D. Kans.), in an opinion that relied on the Fifth Amendment and on *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.).[15] At this point the Judge Advocate General capitulated. And since the Military Prison, to which alone R. S. § 1361 applied, had been discontinued, requiring dishonorably discharged soldiers sentenced to confinement to be held in post guardhouses, new legislation was necessary to subject them to military law. Sec. 5 of the Act of June 18, 1898, c. 469, 30 Stat. 483, 484, accordingly provided: "That soldiers sentenced by court martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice."[16]

3. *Carter* v. *McClaughry*, 183 U. S. 365, the next military prisoner case, is really not very helpful in the present connection. Carter's contention was that, having been dismissed the service, he was a civilian, and could therefore not be further imprisoned under a sentence adjudged by court-martial; appellee of course (see p. 26, *supra*) makes no such argument.

Next, the question of jurisdiction over prisoners was not in the case, as Carter had been tried, not for anything he did as a prisoner, but for an offense committed while still an officer of the Army. Third, R. S. § 1361 was inapplicable, because it referred to the Military Prison at Fort Leavenworth, which some years earlier had been discon-

[15] Both the *Bogart* case and the Fifth Amendment approach have since been disapproved in *Toth* v. *Quarles*, 350 U. S. 11. See pp. 38-39, and 76-81, *infra*.

[16] For the legislative history, see H. R. Doc. 119; H. R. Reps. 224 and 1422, and S. Rep. 1234, all 55th Cong., 2d sess. The later Judge Advocate General's rulings are in Dig. Op. JAG, 1912, p. 513, ¶ VIII.46/2-b.

tinued and transferred to the Department of Justice, for use as a civilian penitentiary. Act of March 2, 1895, c. 189, 28 Stat. 910, 957. Therefore, as indeed the report of the case shows (183 U. S. at 366 and 374), Carter was held, not in the Military Prison at Leavenworth, to which alone R. S. § 1361 applied, but in the United States Penitentiary at the same place, then as now a civilian institution. It follows that the dictum (183 U. S. at 383)—

> "He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. § 1361."

—is on its face inapplicable, and, in consequence, unsound.

4. Section 5 of the 1898 Act (*supra*, p. 29) seems never to have been judicially construed—nor expressly repealed. But in the 1916 Articles of War it was reenacted in substance.

AW 2(e) of 1916 subjected to military law "All persons under sentence adjudged by courts-martial." In *Kahn* v. *Anderson*, 255 U. S. 1, this was held to confer jurisdiction on a court-martial to try a discharged soldier who had committed an offense while a military prisoner. The voluminous briefs in the case (No. 421, Oct. T. 1920) show that neither side cited Winthrop or the earlier rulings of The Judge Advocate General. It may well be, therefore, that the result of the *Kahn* case will not survive reexamination in the light of more thorough consideration.[16a] But it is not necessary to pursue that interesting speculation, be-

[16a] Overruling of *Kahn* v. *Anderson* would not in fact create disciplinary problems in military prisons. By suspending the execution of the dishonorable discharge until the expiration of the prisoner's confinement (MCM, 1951, ¶ 97a), his military status, and hence his subjection to military law, would continue; since, plainly, neither expiration of his enlistment or of his commission destroys military jurisdiction. *Supra*, page 22. And, with the execution of his discharge suspended, he can point to no affirmative act on the part of the Government that has returned him to civilian status.

cause the significant point now is that military jurisdiction over prisoners has since been significantly restricted.

5. In 1920, AW 2(c) was reenacted without change, while AW 42 of that year limited the kinds of offenses and the types of sentences for which military offenders could be confined in a penitentiary.

The Uniform Code effected two changes. First, it permitted convicted military persons to be confined, regardless of whether their discharges or dismissals had been executed, and regardless of the length of their sentences, "in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use;" —and, highly significant—"persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated." Art. 58(a), UCMJ.[17]

And, concomitantly with this change, military jurisdiction over persons sentenced by court-martial was correspondingly restricted; Art. 2(7), UCMJ, subjects to the Code only "All persons *in custody of the armed forces* serving a sentence imposed by a court-martial." [Italics added.][18]

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[17] "* * * The Army in operating under AW 42 has met with great difficulty in segregating the varied types of prisoners and in giving them specialized treatment. * * *" From past experience, the services have found that the type of treatment suited for individuals does not depend on the type of offense or on the length of the sentence. Many of the prisoners who cause special problems in disciplinary barracks are those convicted of military offenses, such as a. w. o. l. or desertion." H. R. Rep. 491, 81st Cong., 1st sess., p. 28; S. Rep. 486, 81st Cong., 1st sess., p. 25.

[18] The legislative history of Art 2(7) is not particularly illuminating: H. R. Rep. 491, p. 10; S. Rep. 486, p. 7; both 81st Cong., 1st sess. But this, like *Greenwood v. United States*, 350 U. S. 366, 374, "is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

Consequently, under the Uniform Code, the only persons sentenced by court-martial and who are placed in civilian penal institutions pursuant to the authority conferred by Art. 58(a), UCMJ, who remain "military prisoners" are those whose discharges have not been executed. Those placed in civilian prisons after execution of their discharges or dismissals, and those civilians, like appellee, who were always such, are in consequence freed from further military control.

Therefore, since in this case appellee has at all times after June 1953 (R. 2) been otherwise than "in custody of the armed forces" (Art. 2(7), UCMJ), since after June 1953 she has been continuously in institutions "not under the control of one of the armed forces" (Art. 58(a), UCMJ), and since she was placed in such custody by the Air Force (R. 2, 8-9; Ex. I, J, R. 123; Ex. L, R. 124-128), it is plain that the Air Force put her where she was no longer subject to military jurisdiction. It necessarily follows that, once her conviction was set aside, she could not further be restrained by the Air Force, much less tried by Air Force court-martial.

Appellant's argument (U. S. Br. 71) that "Appellee's status as a military prisoner alone suffices to preserve military jurisdiction," entirely overlooks the fact that, reading Arts. 2(7) and 58(a), UCMJ, together, appellee ceased to be a military prisoner when she was placed in institutions that were under the supervision, jurisdiction and control, not of any of the armed forces, but of the Department of Justice, the Government of the District of Columbia, and the Department of Health, Education and Welfare, respectively.

C. Where, by Affirmative Act of the Government, a Civilian Ceases to Accompany the Armed Forces Without the Territorial Limits of the United States, Military Jurisdiction Over Him Pursuant to Art. 2(11), UCMJ, Is Destroyed

The jurisdiction over civilians asserted in Art. 2(11), UCMJ, is a territorial jurisdiction. It does not extend to all persons "serving with, employed by, or accompanying the armed forces," but only to the persons in those categories who are "without the continental limits of the United States and without the following territories:" Alaska east of Long. 172° West; the Canal Zone; the main group of the Hawaiian Islands, Puerto Rico; and the Virgin Islands.[19]

Since, then, the jurisdiction is geographical, removal of the individual concerned, by the Government, to a place outside the named geographical limits, would seem to terminate jurisdiction over him, just as effectively as discharge terminates military status, or just as effectively as removal from every other geographical unit terminates the jurisdiction of that unit.

In the absence of extradition or rendition proceedings, the person who has left the territory of a state can no longer be punished by that state. And while there can be extradition to territory that is under military control (*Neely* v. *Henkel*, 180 U. S. 109), there can be no extradition back to a status that is under military control where such status has no territorial basis (*Toth* v. *Quarles*, 350 U. S. 11).

As applied here, the Air Force destroyed further Art. 2(11) jurisdiction over appellee when it returned her to the United States, since at that point she was no longer "accompanying the armed forces of the United States without the continental limits of the United States." Once back in this country she was no longer within the terms of Art. 2(11), and therefore was no longer subject to the

[19] Art. 2(12) is similarly limited geographically.

Code, The Air Force by its own act destroyed her military status.

Some decisions under Art. 2(11) and its predecessor, AW 2(d) of 1920, turn on the question whether, still being overseas, the civilian concerned continues to accompany the armed forces or merges with the civilian population. See *United States* v. *Schultz*, 1 USCMA 512, 518-519, 4 CMR 104, 110-111; *United States* v. *Rubenstein*, 19 CMR 709, 773-777, petition for review granted by USCMA and pending as No. 7278. Where the civilian escapes, there is no difficulty in holding that by his wrongful act he has not succeeded in destroying the jurisdiction that had earlier attached. *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 3), certiorari denied, 338 U. S. 904. Where he is simply discharged, he may well still continue, in fact, to accompany the forces. See *In re Di Bartolo*, 59 F. Supp. 929 (S.D.N.Y.). Where, after his discharge, he leaves the military camp, and ceases, in fact, to accompany the forces, it would seem that jurisdiction has been lost. True, *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), did indeed hold that a civilian, discharged in Eritrea in 1942, could be apprehended in Egypt, to which he had proceeded on his way home, and then be returned to Eritrea for trial by court-martial. This seems questionable; it may well have been this aspect of a war-time camp-follower case that induced the granting of certiorari, 327 U. S. 777.[29]

Apart from the doubtful *Perlstein* case, there is nothing in the cases, and assuredly nothing as a matter of principle, to sustain the proposition that a criminal jurisdiction carefully circumscribed to explicit geographical limits survives a removal of the accused, by the act of the prosecuting sovereignty, outside those limits.

But there is a further and, it is believed, controlling reason, why jurisdiction to retry appellee ceased once she was in this country with her conviction set aside.

[29] The writ was dismissed only because, by reason of petitioner's release, the case became moot. 328 U. S. 822.

Under this heading it has been assumed that Art. 2(11) is constitutional because limited in its operation to overseas areas.[21] No one at least until the present proceeding was commenced had ever contended that civilians accompanying the forces in the United States in time of peace are subject to military law. For such civilians are entitled to a trial by jury, guaranteed in the original Constitution (Art. III, Sec. 2) and in the Sixth Amendment as well. Therefore, once appellee was brought into the District of Columbia, still being a civilian, she came within that dual protection just as the slave Somerset became free once he touched English soil. *Somerset* v. *Stewart*, Lofft 1, 21 How. St. Tr. 1.

For appellant therefore to suggest that ordering appellee's retrial in the District of Columbia is a mere "happenstance" (U. S. Br. 71) is surely to trivialize a guarantee held so vital that, alone among all the others, it appears in the Constitution not simply once, but actually twice.

Does this mean, asks appellant (U. S. Br. 65-66), that appellee must have been held in England for possible retrial to avoid loss of military jurisdiction? The answer is yes, because in this instance that jurisdiction is narrowly geographical.

It is not without significance in this connection that, in the days when court-martial jurisdiction over civilians was limited by statute to time of war, it was held that "the jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*." Dig. Op. JAG, 1912, p. 151, ¶LXIII B 1; Winthrop *138, *141 (reprint, pp. 102, 104). Similarly, a spy cannot be tried for violation of the laws of war after the war has ceased. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

Appellant simply does not face up to the circumstance that, assuming for purposes of argument the constitution-

[21] The constitutional bases of that assumption are discussed at length below, pp. 81-86.

ality of a provision subjecting to trial by court-martial a civilian "accompanying the armed forces without the continental limits of the United States," there is no assumption whatever that can be made for subjecting to trial by court-martial any civilian who, in time of peace, is within the continental limits of the United States. The Constitution forbids.

But the assumption under this heading, that Art. 2(11) is constitutional, will not survive examination. Appellee therefore turns to such examination.

III. ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PURPORTS TO AUTHORIZE THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE

In his brief in *Toth* v. *Quarles*, 350 U. S. 11, the present Solicitor General said (U. S. Br., No. 3 this Term, p. 31, n. 14): "Indeed, we think the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces."

Since the Court held that there was no constitutional basis for the court-martial of Toth, an ex-airman, it would seem to follow as an *a fortiori* proposition that one who had been a civilian all of her life could not be subjected to military jurisdiction in time of peace either.

A review of the authorities will serve to demonstrate the soundness both of the Solicitor General's concession and of the ruling now under review.

As will appear below, appellee relies on the *Toth* case, which reaffirms the views of Winthrop and the published rulings of The Judge Advocate General of the Army over a forty-year period, both to the effect that civilians cannot constitutionally be subjected to military jurisdiction in time of peace.

Appellant for his part puts forward two admitted dicta (U. S. Br. 41), in *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313, and in *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361, together with the recent decision of the Court of Military Appeals in *United States* v. *Burney*, decided on March 30, 1956, after this Court had announced that it would hear arguments on the constitutional validity of Art. 2(11), UCMJ.[21] Since, on any view of the proper scope of collateral review of court-martial proceedings, inquiry may always be made "whether the military court had jurisdiction of the person" (*Carter* v. *McClaughry*, 183 U. S. 365, 380-381; cf. *Burns* v. *Wilson*, 346 U. S. 137, 844-851), it follows that no military court, not even the civilian tribunal at the capstone of the military appellate hierarchy, can conclusively determine the outer limits of military jurisdiction. The *Burney* decision, therefore, can have no more authority than such as inheres in its intrinsic soundness. The Government, which reprints that decision in its brief in No. 713, pp. 30-90, and here incorporates it by reference (U. S. Br. 41), has espoused its reasoning. *Burney* will, therefore, be treated herein simply as a legal argument advanced on appellant's behalf, and will be referred to throughout as "*Burney* Appendix".

In the argument that follows, appellee will show, first, that the *Toth* case simply reaffirms traditionally accepted concepts of the scope of military jurisdiction; next, that military jurisdiction over civilians was, before 1916, always limited to those who in time of war accompanied the forces in the field; third, that when such jurisdiction was extended to civilians overseas in time of peace, in

[21] The Court of Military Appeals had previously, on several occasions, upheld the Art. 2(11) jurisdiction over accompanying civilians. *United States* v. *Weiman*, 3 USCMA 216, 11 CMR 216 (August 21, 1953); *United States* v. *Garcia*, 5 USMCA 88, 17 CMR 88 (November 5, 1954); *United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102 (May 27, 1955).

1916 and again in 1950, Congress was not even advised of the existence of a constitutional question.

Appellee then proceeds to show that dependent wives have never been considered a part of the armed forces, and that from 1775 to 1950, no dependent wife was ever tried by an American court-martial.

The specific constitutional issues involved are next discussed. Appellee shows that the trial of civilians by court-martial in occupied territory rests on the war power, and so cannot justify the trial involved here; and, because of appellant's thoroughgoing confusion between war and peace, a confusion that pervades all of his arguments, proceeds to restate the differences involved.

Appellee next shows that Art. 2(11), UCMJ, cannot be supported by anything in the Fifth Amendment, and then explains why the court-martial power is not greater overseas in time of peace than it is in the United States. And, finally, appellee demonstrates that the disciplinary considerations underlying the court-martial power do not justify the trial of dependent wives by court-martial.

A. Toth v. Quarles, 350 U. S. 11, Simply Reaffirms the Traditionally Accepted Unconstitutionality of Any Legislative Attempts to Subject Civilians to Court-Martial Jurisdiction in Time of Peace

In *Toth* v. *Quarles*, 350 U. S. 11, this Court established three propositions that control the present case:

1. The clause "cases arising in the land or naval forces" in the Fifth Amendment does not constitute a grant of court-martial jurisdiction. 350 U. S. at 14.

2. The power granted Congress "To make Rules for the Government and Regulation of the land and naval Forces", Clause 14 of Article I, Section 8, "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." 350 U. S. at 15.

3. Clause 14, just quoted, is not broadened by anything in the Necessary and Proper Clause, and is to be narrowly limited to "*the least possible power adequate to the end proposed*", citing *Anderson* v. *Dunn*, 6 Wheat. 204, 231. 350 U. S. at 21-23.

It resulted from the foregoing that Congress lacked power to subject former members of the armed forces to military jurisdiction, and that Article 3(a), UCMJ, was accordingly unconstitutional. In so holding, the Court was simply deciding what Colonel Winthrop had always contended as to the unconstitutionality of earlier recapture provisions[32] (1 Winthrop *144-146 [reprint pp. 105-107]), just as, a few years earlier, in *United States* v. *Cooke*, 336 U. S. 210, the Court had sustained Winthrop's opinion that reenlistment cannot revive a military jurisdiction once terminated by discharge. 1 Winthrop, *124 (reprint, p. 93).

In the view of the court below, the necessary implication of *Toth* was that there is no constitutional power to subject a civilian to court-martial jurisdiction in time of peace; as Judge Tamm said (R. 132), "a civilian is entitled to a civilian trial." That implication and that ruling, likewise, not only follow what Winthrop stoutly maintained, but are also in accord with the published views of successive Judge Advocates General of the Army over many years. Neither the scope of the *Toth* case, therefore, nor the ruling now under review, can be dismissed as recent revelations unsuspected by earlier generations of military lawyers.

In a section of his classic treatise entitled "General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace", Winthrop wrote (*143; reprint, p. 105), "That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and

[32] AW 60 of 1874; AW 94 of 1916, 1920, and 1948; AGN 14 (Eleventh).

jurisdiction, in time of peace, is a fundamental principle of our public law"; and, after a lengthy discussion of the "Constitutionality of the Statutes" to the contrary, notably AW 60 of 1874, he concluded with the italicized observation (*146; reprint p. 107) that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

In expressing these views, Colonel Winthrop was in no sense giving vent to private opinions at variance with those of his official superiors. To the contrary, Winthrop was simply writing in his treatise just exactly what The Judge Advocate General of the Army had published to the service and to the public over a forty-year period.

Here are the pertinent paragraphs from the 1912 *Digest of Opinions of The Judge Advocates General of the Army:*

"VIII G 2 a. [p. 513.] By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury 'in all criminal prosecutions.' Thus—in time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial." P. 513, citing rulings from 1866, 1867, and 1905.[23]

"VIII G 2 a. (1). [p. 513.] *Held* that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional." P. 513, citing rulings from 1879, 1905, and 1906.[24]

"LXIII B. [p. 151.] The jurisdiction authorized by this article [AW 63 of 1874, *infra* p. 43] can not be extended to civilians employed in connection with

[23] The two earlier opinions are also digested in the Digest of 1880 at p. 211, ¶ 7; in the Digest of 1895 at pp. 325-326, ¶ 7; and in the Digest of 1901 at pp. 293-294, ¶ 1031.

[24] The first opinion is also digested in the Digest of 1880 at p. 212, ¶ 8; in the Digest of 1895 at p. 326, ¶ 8; and in the Digest of 1901 at p. 294, ¶ 1032.

> the Army *in time of peace* [citing 16 Op. Att'y Gen. 13 and 48], nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war." P. 151, citing a ruling from 1877, with related rulings from 1877, 1903, and 1909.[25]

Surely those who expressed and published the foregoing views cannot fairly be charged either with espousing a doctrinaire brand of libertarianism, with lack of martial ardor, or with less than full devotion to the cause and the needs of the armed forces. The present case is therefore preeminently one calling for an application of the rule that opinions of The Judge Advocate General of the Army on questions of military law are entitled to particular weight. *United States* v. *Cooke*, 336 U. S. 210, 216; *Hiatt* v. *Brown*, 339 U. S. 103, 109; cf. *Bowen* v. *Johnston*, 306 U. S. 19, 30.

Indeed, prior to 1916 there is, with respect to the nonamenability of civilians to trial by court-martial, not even the shadow of a philosophical doubt, let alone a dissenting voice; other military writers of the period, General Davis, a former Judge Advocate General, and Colonel Dudley, Professor of Law at West Point, expressed identical views. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 52-53, 478-479; Dudley, *Military Law and the Procedure of Courts-Martial* (2d ed. 1908) 413-414.

The result of the foregoing is this, that the ruling now under review reflects, not any new departure, but rather a return to basic first principles.

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[25] The earlier rulings will also be found in the Digest of 1880 at p. 49, ¶ 5; in the 1895 Digest at p. 76, ¶ 5; and in the 1901 Digest at p. 57, ¶ 165.

Winthrop, it is true, published his last edition in 1896, before the Spanish War, and died on April 8, 1899,[26] three days before the effective date of the Treaty of Paris. 30 Stat. 1754. And so appellant says (U. S. Br. 44), "the world about which Colonel Winthrop wrote no longer exists." Perhaps not; but the Constitution whose military clauses he expounded still does.

The opinions of The Judge Advocate General are dismissed with the footnote comment (U. S. Br. 45, n. 23) that "it seems clear that [they] dealt with civilians *within the United States* * * *." But although the latest of those rulings are from 1905 and 1906 (*supra*, p. 40), as was indicated in appellee's Motion to Dismiss, &c., at 8, their full text is not produced. It is therefore not at all clear that they were limited as appellant now suggests. And since any privilege that may have attached to those opinions has of course been waived by their publication in digest form, is it not fair to infer from the fact of non-production that their full text would not be favorable to appellant? *Clifton* v. *United States*, 4 How. 242, 247.

Appellant makes no comments on the views of General Davis, last published in 1915, nor on those of Colonel Dudley, expressed in 1908. Apparently a general understanding among military lawyers is not considered by him to be of significance in the present connection.

B. The Only Civilians Who Can Constitutionally be Tried by Court-Martial as "Part" of the Armed Forces Are Those Who Accompany Those Forces "In the Field" in Time of War

1. Appellant badly misleads the Court when he says (U.S. Br. 32) that "The concept of subjecting to military jursdiction civilians accompanying armies is not new."

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[26] Prugh, *Colonel William Winthrop: The Tradition of the Military Lawyer* (1956) 42 A.B.A.J. 126, 190; Fratcher, *Colonel William Winthrop* (1944) 1 The Judge Advocate Journal, No. 3, p. 12 at p. 14.

It may not have been new to James II (U. S. Br. 32), who assuredly is strange authority to cite in a case involving individual liberties. After all, most Bills of Rights, in his lifetime and thereafter, both in England and in the United States, were designed to prevent in the future any recurrence of the abuses which characterized that monarch's reign. But, certainly with respect to American military codes prior to 1916, appellant's quoted statement is demonstrably untrue—unless it is materially qualified. For it is an historical fact that, until Congress was induced to enlarge the jurisdiction in 1916, without any intimation that a constitutional question was involved, and without being advised of the earlier precedents (see *infra*, pp. 52-60), camp-follower jurisdiction in the United States was always limited to those civilians who, in time of war, accompanied the armies in the field.

The Revolutionary Articles of War dealing with camp followers (Art. XXXII of 1775; Sec. XIII, Art. 23 of 1776) were hardly varied in language when, in 1806, they were reenacted by the Congress of the United States in terms that remained law until 1917.[27] Here is AW 60 of 1806:

> "All [sutlers and] retainers to the camp, and all persons [whatsoever,] serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

The bracketed words were dropped in 1874 when this article was renumbered as AW 63, sutlers having been legislated out of existence a few years earlier (*infra*, p. 45).

On its face, the quoted provision is unlimited as to time. But AW 60 of 1806 and AW 63 of 1874 were uniformly construed as applicable only in time of war in the field, as

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[27] The bulk of the 1916 Articles of War did not take effect until March 1, 1917. Sec. 4 of the Act of August 29, 1916, c. 418, 39 Stat. 619, 670.

inapplicable in time of war not in the field, and as wholly inapplicable in time of peace anywhere. See, for the views of the Attorney General to this effect, 16 Op. Atty. Gen. 13 and 48; for those of The Judge Advocate General of the Army, Dig. Op. JAG, 1912, pp. 151-152, ¶¶LXIII A to LXIII D; *id.*, 1901 pp. 56-58, ¶¶161-168; *id.*, 1895, pp. 75-77, ¶¶ 1-8; *id.*, 1880, pp. 48-49, ¶¶ 1-8; and for those of recognized text-writers, Winthrop, *131-138 (reprint, pp. 97-102); Davis, *op. cit. supra*, pp. 52-53, 478-479; Dudley, *op. cit. supra*, pp. 413-414.

Consequently, appellant's unqualified assertion (U. S. Br. 32), quoted above, involves a palpable misstatement of American military law as it was understood and applied over many years, and moreover wholly blurs the vital distinction between war and peace. See further, pp. 69-76 *infra*. Rarely has a litigant rested his appeal on a more fallible foundation.

2. Not only, then, was military jurisdiction over civilians deemed limited in its exercise to time of war and in the field, but the boundaries of the jurisdiction were at all times maintained within rigorously contracted limits. Thus, in the case of the many undeclared Indian wars that marked our military history in the last half of the Nineteenth Century, it was ruled that court-martial jurisdiction could not be extended "to civilians employed in such connection during the period of an Indian war, but not on the theater of such war" (Dig. Op. JAG, 1912, p. 151, ¶ LXIII B; *id.*, 1901, p. 57, ¶ 165; *id.*, 1895, p. 76, ¶ 5; *id.*, 1880, p. 49, ¶ 5). And it was likewise ruled, in 1877 and again in 1903 and 1909, that "In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war" (Dig. Op. JAG, 1912, p. 151, ¶ LXIII B; *id.*, 1901, p. 57, ¶ 165; *id.*, 1895, p. 76, ¶ 5; *id.*, 1880, p. 49, ¶ 5). *Accord*, Winthrop, *136-137 (reprint, p. 161). Therefore, to the extent that today (*Burney* Appendix, p. 75) "our foreign

armies may be likened to the Army garrisons in the far west during the days of the Indian wars," historical precedent is strongly against the appellant.

Significantly enough, this limited and exceptional jurisdiction over civilians was held not to survive the end of a war, whether general or against Indians. "The jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*." Dig. Op. JAG, 1912, p. 151, ¶ LXIII B 1; *id.*, 1901, p. 57, ¶ 166; *id.*, 1895, p. 76, ¶ 6; *id.*, 1880, p. 49, ¶ 6; Winthrop, *138 (reprint, p. 102). In this respect the jurisdiction to try civilians by court-martial resembled the jurisdiction to try a spy, which, it was held, disappeared once the war ended. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

3. It made no difference that the civilian in question lived on the post and was closely connected functionally with the operations of the Army; there was still no jurisdiction to try him by court-martial in time of peace, as is shown by the situation of the now all but forgotten post trader.

Post traders functioned for about a generation, after the abolition of sutlers effective July 1, 1867 (by Sec. 25 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 336) and before post canteens had been transformed into the now familiar post exchanges in 1892.[28]

[28] Although further appointments of post traders were terminated by the Act of January 28, 1893, c. 51, 27 Stat. 426, their disappearance overlapped the emergence of the successor institutions. Post canteens had long been organized, their formal regulation, however, appears to date from General Orders 10, HQ. of the Army, 1889. By General Orders 11, HQ. of the Army, 1892, it was directed that "The institution now designated as the Post Canteen will be hereafter known as the Post Exchange," and the Act of July 16, 1892, c. 195, 27 Stat. 174, 178, reflected the new designation.

Other accounts of the emergence of the post exchange (*Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483-484; *Dugan* v. *United States*, 34 C. Cls. 458) appear to overlook the earlier directives.

By the Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, as well as by Sec. 22 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319-320 (later R. S. § 1113), it was declared "That such traders shall be under protection and military control as camp followers"; and by Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100 (which, according to the Attorney General, 15 Op. Atty. Gen. 278, 280, did not repeal R. S. § 1113), it was further provided that every post trader "shall be subject in all respects to the rules and regulations for the government of the Army."

The generality of these provisions differs not one bit from the broad language of AW 63 of 1874 (*supra*, p. 43) which declared that "all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." According to appellant's reading of the pre-1916 Articles of War (U. S. Br. 34), it would follow that Congress had subjected post traders to military jurisdiction. But The Judge Advocate General of the Army held precisely the contrary (Dig. Op. JAG, 1901, p. 563, ¶ 2023; *id.*, 1895, pp. 599-600, ¶ 4; *id.*, 1880, p. 384, ¶ 4):

> "A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War, viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by court martial in time of peace. * * * If * * * the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army,

> *viz.* Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made so liable when not thus situated * * *."

The foregoing should serve as a conclusive answer to any who, in the face of consistent precedents to the contrary, still seek to assert that the test is simply whether the particular civilian is "directly connected with the forces" (U. S. Br. 28, 46), or who (*Burney* Appendix, p. 75) analogize today's cold war situation to the Indian-fighting days of the last century.[29]

4. How far, in time of either general or limited war, the concept of "in the field" may properly be extended, is not in issue here. Both in May 1953, when appellee was tried in England, and in November 1955, when she was sought to be retried in the District of Columbia, the United States was not involved in any declared war, nor were any hostilities in progress at either place. Consequently, discussion of the extent of "in the field" may properly be relegated to the case of *Kinsella* v. *Krueger*, No. 713, where that question was at least raised by the pleadings. See Point III, pp. 12-16, of the Respondent's Brief in that case.

5. At any rate, Congress made no attempt of any kind to extend military jurisdiction over civilians in time of

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[29] In *In re Varney*, S. D. Calif., Civil No. 19257-C, Feb. 16, 1956, it was said (Conclusion of Law II (b)), "At that time [i. e., of the adoption of the Constitution], retainers to the military camp and persons having a civilian status serving with the armies in the field were subject to military law and trial by court martial. Petitioner falls within that class of persons thus exempted from the aforesaid provisions of the Constitution and hence subject to military law since prior to the adoption of the Constitution of the United States."

Rarely, it is submitted, will a more egregiously incorrect statement of historical fact be found in a judicial decree.

peace until 1916, when it enacted the revised Articles of War of that year. It will be pointed out below, pp. 52-60, that, at no time during the Congressional consideration of those Articles, and at no time thereafter, was Congress or any Congressional committee ever advised, from any source, either of the limited construction placed on the earlier camp follower Articles, or of the circumstance that any extension of military jurisdiction over civilians in time of peace involved a serious constitutional question.

The point to be noted here is that AW 2(d), as it was enacted in 1916, as it was reenacted in 1920, and as it remained in force until the Uniform Code of Military Justice took effect in 1951, came before the civil courts only in cases that arose out of military trials of civilians in time of war, or in cases where such trials took place in occupied territory—where, see pp. 71-76, *infra*, the war power was being exerted—and never, before the instant proceeding was brought, in any case involving the court-martial of civilians in non-occupied territory in time of peace.

Appellant cites thirteen cases (U. S. Br. 40-41) for the proposition that "The power of Congress to provide for trial by court-martial of civilians accompanying our armed forces overseas has been recognized by this Court as 'well-established' * * * and has been repeatedly enforced by the lower federal courts." But even under preliminary analysis, appellant's authorities, like old soldiers, simply fade away: Only a single one of those cases deals with the question now at issue, the power to court-martial civilians in time of peace in other than occupied territory—and that sole exception is presently under review in No. 713, this Term!

A. This Court's asserted "recognition" of the Congressional power is based on two admitted (U. S. Br. 41) dicta: In *Duncan* v. *Kahanamoku*, 327 U. S. 304, the question concerned war-time martial law in Hawaii, not

military law under the Articles of War, and the cases cited by the Court at 313 were war time camp-follower cases.[30] And *Madsen* v. *Kinsella*, 343 U. S. 341, which arose in occupied territory, is not in point for the reasons stated below at pp. 69-67, and the dictum is moreover valueless as a precedent, as is pointed out at p. 64.

B. Six other cases relied on by appellant arose in time of war.[31] Since no one has ever seriously questioned the exercise of jurisdiction over camp-followers in time of war in the field, those cases do not help appellant here. The only questions in the war-time situation are, first, whether the particular case in fact arose "in the field";[32] and, second, whether jurisdiction had terminated by reason of the accused's ceasing to accompany the forces.[33]

C. Two other cases relied on by appellant arose in occupied territory, where the court-martial of civilians rests on the war power and not on the power to govern the

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[30] *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U. S. 645.

[31] *Hines* v. *Mikell*, *Ex parte Gerlach*, *Ex parte Falls*, *Ex parte Jochen*, all *supra* note 30; *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U. S. 777, and dismissed because moot, 328 U. S. 822.

More complete study would have disclosed the following additional war-time camp-follower cases: *In re DiBartolo*, 50 F. Supp. 929 (S.D.N.Y.); *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); and *Shilman* v. *United States*, 73 F. Supp. 648 (S.D.N.Y.), reversed in part, 164 F. 2d 649 (C.A. 2), certiorari denied, 333 U. S. 837.

[32] *Ex parte Falls*, *Hines* v. *Mikell*, *Ex parte Jochen*, *In re Berue*, all *supra* note 30; *McCune* v. *Kilpatrick*, *supra* note 31; and the following cases not cited by appellant: *Ex parte Weitz*, 256 Fed. 58 (D. Mass.); *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z.). See pp. 12-16 of Respondent's Brief in No. 713.

[33] *Perlstein* v. *United States*, *In re DiBartolo*, both *supra*, note 31.

armies.[34] This vital distinction, which appellant blurs throughout his argument, is expounded below at pp. 71-76.

D. That leaves only three other authorities.

(i) In *Rubenstein* v. *Wilson*, 212 F. 2d 631 (D.C. Cir.), the proceeding was remanded for ascertainment of petitioner's exact relationship to the forces. The case was decided by the same Circuit that so shortly thereafter misread constitutional limitations on the court-martial power. *Talbott* v. *United States ex rel. Toth*, 215 F. 2d 22, reversed *sub nom. Toth* v. *Quarles*, 350 U. S. 11.

(ii) The *Burney* case, decided by the United States Court of Military Appeals after argument was directed in the present case, is, for reasons already stated (*supra*, p. 37), not an authoritative determination; that court, of course, cannot speak the last word on the scope of its own powers. And whether it may properly be included within the expression "lower federal courts" (U. S. Br. 41), at least as that phrase is normally understood, is probably open to question. Cf. *Shaw* v. *United States*, 209 F. 2d 811 (D.C. Cir.).

(iii) There is left only appellant's thirteenth case, *United States* v. *Kinsella*, 137 F. Supp. 806 (S.D. W. Va.) —which is under review as No. 713 of the present Term, and so hardly qualifies as an authority, least of all since the ruling below in the present case is precisely the other way.[35]

Consequently, once they are accurately and understandingly read, the civilian decisions relied on by

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[34] *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U. S. 904; *Grewe* v. *France*, 75 F. Supp. 433 (E.D. Wis.).

[35] On the issue presented here, the district courts are equally divided. The decision below in this case was followed in *Hurlahe* v. *Wilson*, Habeas Corpus No. 94-55, D. D. C., McGarraghy, J., decided January 4, 1956; while the *Kinsella* case was followed in *In re Varney*, *supra* note 29, S.D. Calif., J. M. Carter, J.

appellant that antedate the ruling below here do not run counter to the views expressed by Winthrop and by successive Judge Advocates General as to the scope of military jurisdiction over civilians in the field in time of war (*supra*, pp. 39-41, 43-47), and do not in any sense sustain the far more extensive jurisdiction now sought to be exerted and justified in the present case.

It may be significant that even the war-time camp-follower jurisdiction is not inherent and requires a statutory basis. Thus the Navy, which until 1943 did not have a statutory war-time jurisdiction over camp followers, was accordingly held to lack power to try accompanying civilians in time of war and in the war zone. *Hammond* v. *Squier*, 51 F. Supp. 227 (W.D. Wash.); cf. CMO 11 of 1937, pp. 16-19. And the Navy's 1943 statutory jurisdiction was expressly limited to time of "war or national emergency". Act of March 22, 1943, c. 18, 57 Stat. 41; 34 U. S. C. (1946 ed.) § 1201.

6. The traditional military jurisdiction over civilians in time of war is now set forth in Article 2(10), Uniform Code of Military Justice, which subjects to the Code

> "In time of war, all persons serving with or accompanying an armed force in the field;"

That jurisdiction is not, and, it is believed, could not successfully be, questioned. That jurisdiction is ample to the real needs of the forces. That jurisdiction is within the traditional limits expounded during what may properly be called the classical period of American military law. That jurisdiction remains within the precise limits that were established in the earliest days of the Revolution. That jurisdiction conforms to the constitutional power "To make Rules for the Government and Regulation of the land and naval Forces", since civilians accompanying the forces in time of war in the field may properly, as a matter of history and of logic and of constitutional development alike, be so far deemed a "part" of the armed

forces as to be subject to trial by court-martial. *Toth* v. *Quarles*, 350 U. S. 11, 15. That jurisdiction may be exercised even within the United States, if in time of war unhappily its territory should be included "in the field", for the reason that, when the Constitution was adopted, civilian camp followers with the armies in the field in time of war were not entitled to a jury trial. AW XXXII of 1775; Sec. XIII, Art. 23 of 1776; cf. *Ex parte Quirin*, 317 U. S. 1, 38-41; *Whelchel* v. *McDonald*, 340 U. S. 122, 126-127.

C. Congress Has At No Time Ever Been Advised Even of the Existence of a Constitutional Question With Respect to the Trial of Civilians by Court-Martial in Time of Peace Outside of Occupied Territory

As was pointed out above, pp. 43-47, court-martial jurisdiction over civilian camp followers, though general in terms (Art. XXXII of 1775; Sec. XIII, Art. 23 of 1776; AW 60 of 1806; AW 63 of 1874), was, before and contemporaneously with the adoption of the Constitution, and for well over a century thereafter, strictly limited in its application to those civilians who, in time of war, accompanied the armies in the field. To that extent, cf. U. S. Br. 32, history and precedent support appellee rather than her adversary.

That jurisdiction was never extended prior to 1916.[36] In that year, Brig. Gen. (later Maj. Gen.) E. H. Crowder, then The Judge Advocate General of the Army, appeared before the Senate Committee on Military Affairs to urge the enactment of his revision of the Articles of War, which was enacted into law in August of that year.

His proposal was (Sen. Rep. 130, 64th Cong., 1st sess., p. 2) to confer, in time of peace as well as in time of war, court-martial jurisdiction over "All retainers to the camp and all persons accompanying or serving with the armies

[36] In view of the failure of pre-1916 attempts to revise the Articles of War then contained in R. S. § 1342, see U. S. Br. 34-35, it does not seem necessary to analyze their history in detail.

of the United States without the territorial jurisdiction of the United States * * * though not otherwise subject to these articles." This became, without any change, AW 2(d) of 1916 (*infra*, p. 124) which, in that form, remained law through May 30, 1951.

General Crowder explained why, in his view, it would be desirable to extend court-martial jurisdiction over civilians accompanying the Army overseas even in time of peace. See Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38, quoted—but only in part—at U. S. Br. 35-36.

But nowhere in his justification for this proposal, which enlarged so materially the previously accepted boundaries of military jurisdiction, and which for the first time purported to subject civilians to trial by court-martial in time of peace, did General Crowder advise the Committee that like extension of jurisdiction had been deemed unconstitutional, not only by Colonel Winthrop, whom Crowder himself formally acknowledged, only a few years later, as "the Blackstone of military law, a man of superb reasoning power,"[37] but also by a whole series of his own predecessors in the office of Judge Advocate General of the Army. *Supra*, pp. 39-41.

General Crowder was, of course, perfectly free to express disagreement with the prior views of others and with the previously published opinions of his own predecessors. In asking the Congress to expand the hitherto recognized limits of court-martial jurisdiction, he was not precluded from urging, as appellant now does, that the proposed new grant of power rested on the treaty power (U. S. Br. 48-61), or that the constitutional grant of court-martial power somehow has a greater content outside the three-mile limit (U. S. Br. 61-65).

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[37] *Establishment of Military Justice*, Hearings before a Subcommittee of the Committee on Military Affairs, U. S. Senate, 66th Cong., 1st sess., on S. 64, p. 1171 (Oct. 24, 1919).

Nor was General Crowder foreclosed from suggesting (U. S. Br. 37) that "a broadened class of civilians has come to have the kind of direct relationship to the military which is familiar today", or (U. S. Br. 38) "that the United States was no longer an isolated nation insulated from Europe and Asia by ocean barriers, but that our armed forces, consisting of military and civilian personnel, might be deployed throughout the world even in time of peace", or (U. S. Br. 47) that "at the present time not only weapons of war, but the whole area of defense and the whole system of military arrangements, are very different from those that existed before 1916."

But General Crowder did not say any such things. His testimony (Sen. Rep. 130, 64th Cong., 1st sess., pp. 30, 38) shows that he had in mind only the problem of troops and retainers in transit, and the case of one clerk who embezzled funds in Cuba during the 1906-1909 intervention there, and who could not thereafter be punished because he was within the amnesty proclamation that the Cubans had issued after the American forces evacuated the island.

Moreover, General Crowder did not even mention, let alone discuss, the constitutional implications of his proposal. He not only expressed no opinion of his own at variance with the hitherto published views of earlier Judge Advocates General, he did not advise the Committee of those views, and he did not even apprise the Congress that what he was asking it to enact contained the seeds of a most serious constitutional question. And so Congress adopted A-W 2(d) in utter ignorance of the existence of a constitutional question. Indeed, all that the Senate Committee said (S. Rep. 130, 64th Cong., 1st sess., p. 18) was that the traditional war-time limitation of camp-follower jurisdiction "has led to some embarrassment under conditions like those which obtained in Cuba after

peace was restored following the Spanish War,[38] and also during the second Cuban intervention."[39]

Appellant makes apparently persuasive arguments (U. S. Br. 37-39, 47) as to what Congress had in mind in 1916. Once the actual documents underlying the 1916 Articles of War are examined, however, it is plain that those contentions, regardless of how much they may reflect the resourcefulness of able advocacy, do not rest on any legislative facts of record.

AW 2(d) became effective on March 1, 1917 (*supra*, p. 43, note 27), and within little more than a month, the United States was at war. 40 Stat. 1. Of the five reported World War I cases involving AW 2(d), three dealt with the scope of "in the field" and so are not relevant here,[40] and the other two concerned employees on an Army transport. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.);

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[38] This is not based on Gen. Crowder's testimony and seems plainly wrong; *Neely* v. *Henkel*, 180 U. S. 109, involved a prosecution by the military government after the Treaty of Peace became effective.

[39] When the bill was debated in the Senate, Art. 2(d) was not mentioned. 53 Cong. Rec. 3828-3830. Thereafter, the House not having acted, the Articles of War were appended in the Senate as a committee amendment to the Army Appropriation Act for that year. 53 Cong. Rec. 11504-11512. Camp-follower jurisdiction was briefly mentioned, but its constitutionality was not discussed. *Id.* p. 11511. The House concurred in the amendment, but the conferees' exemption of retired officers from military jurisdiction (S. Doc. 526; H. R. Rep. 1091, both 64th Cong., 1st sess.) caused President Wilson to veto the entire appropriation act (H. Doc. 1334, 64th Cong., 1st sess.).

After the veto message was read, a new bill without the Articles of War was introduced and passed. 53 Cong. Rec. 12845, 12983, 12993. In the Senate, the Articles of War (with the President's objection obviated) were once more added as a committee amendment. 53 Cong. Rec. 13036-13042. This time the House concurred *in toto*. *Id.* at p. 13208.

[40] *Ex parte Jochen*, *Hines* v. *Mikell*, both *supra*, note 30; *Ex parte Weitz*, *supra*, note 32. These are adverted to in Point III, pp. 12-16, of Respondent's Brief in *Kinsella* v. *Krueger*, No. 713.

Ex parte Falls, 251 Fed. 415 (D.N.J.). None of the five therefore involves court-martial jurisdiction over civilians in time of peace.

In 1920, AW 2(d) was reenacted without change, and, beginning in 1941, court-martial jurisdiction thereunder was in fact widely exercised over civilian camp followers abroad, both before and after the United States' entry into World War II; as the June 1945 enumeration at 4 Bull. JAG 223-229 shows.

The 1941 cases there listed accordingly represent the first American instances of trials of civilians by court-martial in time of peace that had the approval of the military reviewing authorities. The "history" that appellant invokes (U. S. Br. 32) is thus of extremely recent origin. And, as has been shown, all of such cases that later came before the civil courts either involved offenses committed after December 8, 1941, and before the proclaimed end of hostilities on December 31, 1946 (61 Stat. 1048),[41] or else arose in occupied territory, where, as is pointed out below, pp. 73-76, there existed an independent basis for the exercise of court-martial jurisdiction.[42]

Again, none of these cases discusses or throws any light on the exercise of court-martial jurisdiction in time of peace in non-occupied territory.

The partial revision of the Articles of War in 1948 involved no change in AW 2(d), and the leading case thereunder, *Madsen* v. *Kinsella*, 343 U. S. 341, arose in occupied Germany.

Then, in 1950, Congress reenacted and broadened court-martial jurisdiction over civilian camp followers in time of peace through the enactment of Art. 2(11), UCMJ

[41] *In re Berue*, *Perlstein* v. *United States*, *In re DiBartolo*, *McCune* v. *Kilpatrick*, *United States* v. *Shilman*, all *supra* note 31.

[42] *United States ex rel. Mobley* v. *Handy*, *Grewe* v. *France*, both *supra*, note 34.

(*infra*, p. 125), the provision now at issue. But nowhere in all the voluminous legislative history of the Uniform Code of Military Justice is there a single expression, from any source, that reflects so much as a glimmering awareness of any constitutional problem.

(a) The Committee Reports on Art. 2(11)—(H. R. Rep. 491, p. 11; Sen. Rep. 486, pp. 7-8; both 81st Cong., 1st sess.) —say nothing of any constitutional issue, and the Conference Report (H. R. Rep. 1946, 81st Cong., 2d sess.) does not mention Art. 2(11).

(b) The hearings are similarly devoid of notification by anyone that a constitutional issue lurked in Art. 2(11). Neither the witness who told the House Committee that "I don't think, gentlemen, it has been in accordance with the tenets of the Constitution that the civilians should be subject to the military,"[43] nor the one who testified before the Senate Committee that "The framers of the Constitution recognized that civilians should be tried by civilian courts and they established a military system of courts for the Army and Navy",[44] can fairly be considered to have advised these bodies that they were being asked to enact a statute that Winthrop and successive Judge Advocates General of the Army had considered unconstitutional (*supra*, pp. 39-41).

The bulk of the criticism of Arts. 2(11) and 2(12) as originally drafted was that they might be in conflict with international law (House Hearings, pp. 811, 817; Senate Hearings, p. 266), and it was this which led to the committee amendment that added the clause, "Subject to the provisions of any treaty or agreement to which the United

[43] *Uniform Code of Military Justice*, Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st sess., on H. R. 2498, p. 768.

[44] *Uniform Code of Military Justice*, Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, 81st Cong., 1st sess., on S. 857 and H. R. 4080, p. 256.

States is or may be a party or to any accepted rule of international law", which now introduces both provisions. 95 Cong. Rec. 5722, 5742; 96 Cong. Rec. 1294, 1295-1296.

(c) Apart from the discussion over the necessity for the "Subject to" clause to prevent international complications, the debates on Articles 2(11) and 2(12) concerned only scope and policy. Senator McCarran questioned the broad scope of Art. 2(11) and therefore sought, though without success, to have the pending bill referred to the Judiciary Committee (96 Cong. Rec. 1366-1368, 1412-1413, 1417). Senator Morse inserted in the *Record* a law review article that objected to Art. 2(11) on the view that it would subject civilians on Guam to trial by court-martial (96 Cong. Rec. 1435).

But again there was no mention whatever of the long line of Winthrop-Judge Advocate General rulings to the contrary (*supra*, pp. 39-41), and not one whisper, from any lawyer member in either house, to the effect that Art. 2(11) might involve a constitutional issue. Not only was there no objection on constitutional grounds, there was not even the expression of a constitutional doubt. It is therefore a fact that neither the expertise of the "eminent committee of experts", nor the "full consideration" by Congress, on both of which appellant relies (U. S. Br. 37), extended to a consideration of the constitutional scope of the court-martial power.

"It is not to be lightly supposed", wrote Judge Moore in the *Krueger* case (R. 18, No. 713), "that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power." It is not lightly to be supposed, true enough, but in this instance it happens to be the documented fact that, in 1916 and again in 1950, when Congress purported to confer on courts-martial jurisdiction over civilians in non-occupied territory in time of peace, it not only made no inquiry

whatever into the scope of its constitutional power, it was not even aware that inquiry was necessary.

"It is not probable that in any session [of Congress]," wrote Judge Moore (R. 18, No. 713), "there should be a dearth of members who are themselves expert in the field of Constitutional law." But, again, it is the documented fact that Congressional expertise in the constitutional realm did not include the scope of the court-martial power, and that no member and no witness pointed to the pronouncements of the worthies of old in that specialized field.

Here again, the considerations that appellant now puts forward (U. S. Br. 37-39, 47-48) to justify military jurisdiction over civilians, considerations based on world events, American military commitments, and the like, however persuasive these may appear on their face, were never, as the extensive legislative history of the Uniform Code demonstrates, articulated by any witness before either Committee, or by any member of either House anywhere. Everyone took the validity of AW 2(d) for granted; no one remembered, or cared to inquire, what the earlier constitutional views had been; and the discussions of Arts. 2(11) and 2(12) accordingly were limited to matters of coverage. The rationalizations now formulated by the appellant were simply not in anyone's mind while the Code was under consideration.

This Court had no hesitation in striking down Art. 3(a), UCMJ, the constitutionality of which was fully discussed in the course of the legislative process, and which, certainly as applied to particular offenses, had been on the books for over ninety years, since 1863. *Toth* v. *Quarles*, 350 U. S. 11, 20-21. There should accordingly be no feeling of reluctance in disposing of the (at least) equally invalid Art. 2(11), concerning which no one was even sufficiently informed to express a doubt or ask a question, which, in its substance, had been enacted only in 1916, and which prior to 1941 was never applied to persons in appellee's

status, viz., civilians in non-occupied territory in time of peace.

D. Dependent Wives Are No More a "Part" of the Armed Forces Abroad Than They Are in the United States

1. What this Court said in *Toth* v. *Quarles*, 350 U. S. at 15, bears repetition here:

> "For given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."

Obviously appellee here was not a member of the armed forces. It is equally clear that she was no "part" of the armed forces, and in the related case of Dorothy Krueger Smith, Judge Moore so held specifically (R. 19, No. 713): "I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is 'part' of the armed forces."[45] Indeed, but for appellant's vehement insistence that every dependent service wife abroad is a "part" of the armed force of which her husband is a member, one would have deemed the point too clear for argument.

The fact of the matter is that, except in a rhetorical sense, and except in the sense that the garrulous service dowager identifies herself with the uniform in prattling about "When we were lieutenants", a dependent wife has never been a part of any armed force, and has never been so considered. Law and practice combine with ordinary good sense and the common usage of English speech in rejecting appellant's contention to the contrary.

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[45] Yet Judge Moore nonetheless went on to sustain court-martial jurisdiction over Mrs. Smith on the basis of the Necessary and Proper Clause—in the face of this Court's holding that that clause did not enlarge the grant of court-martial jurisdiction (350 U. S. at 21-23), and in the face of the passage quoted in the text.

2. For well-nigh 175 years after Washington took command of the Continental forces at Cambridge and thus created the United States Army, no wife of any American soldier was ever tried by court-martial. The civilians subjected to military law by the Continental Articles of War of 1775 and 1776 (*supra*, p. 43) all had some functional connection with the forces that were fighting for independence, and it is not of record that, when Martha Washington visited her husband at the Headquarters of those forces at Valley Forge and at Morristown (4 Freeman, *George Washington*, 412, 581, 624), she was ever considered to have subjected herself thereby to trial by court-martial.[46]

Indeed, when Winthrop completed the last edition of his immortal treatise, after devoting some thirty-five years to the administration and the study of military law, the only case that he could find where a wife had been tried by court-martial as a camp follower originated in the British Army in India in 1825, and there the woman concerned had been characterized as a "wife or reputed wife"

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[46] In the *Burney* Appendix, p. 41, it is asserted that Washington "stated that women of the camp follower description should be either turned out of camp or arrested for trial and punishment", citing 10 *Writings of Washington* 421.

The reference is to Washington's General Orders at Valley Forge, Feb. 4, 1778; this is what they actually provide:

"The most pernicious consequences having arisen from suffering persons, women in particular to pass and repass from Philadelphia under Pretence of coming out to visit their Friends in the Army and returning with necessaries to their families, but really with an intent to intice the soldiers to desert; All officers are desired to exert their utmost endeavors to prevent such interviews in future by forbiding the soldiers under the severest penalties from having any connection with such persons and by ordering them when found in camp to be immediately turned out of it.

"If any of them appear under peculiar circumstances of suspicion they are to be brought to immediate trial and punishment, if found guilty."

Plainly, these were not camp followers; and the Index to the *Writings of Washington* discloses no trial of dependent wives by any Continental Army court-martial.

(Winthrop, *133; reprint, p. 99).[47] "In any event", as the Solicitor General told this Court in *Madsen* v. *Kinsella* (U. S. Br., No. 411, Oct. T. 1951, pp. 44-45), "the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

American practice did not change after Winthrop wrote. Again to quote the Solicitor General's *Madsen* brief (supra, pp. 44, 45), "Petitioner's contention that the wives of soldiers were subject to trial by court-martial prior to 1916 under the former AW 63 is inconsistent with the terms and construction of that article * * *. Neither the petitioner nor the respondent has found any case of a wife or other dependent of a soldier who was tried by an American court-martial prior to the revision of the Articles of War in 1916."

Nor did American participation in two global wars effect a change. In June, 1945, The Judge Advocate General of the Army compiled a long list of instances of civilian camp followers tried by court-martial under AW 2(d) and its analogues. 4 Bull. JAG 223-229. In every instance there noted, the civilian subjected to military jurisdiction had had some fairly obvious connection with the Army. In no instance there noted had any dependent wife been tried by court-martial.

Certainly all of the foregoing is compelling evidence that American military lawyers did not consider dependent wives to be a "part" of the armed forces and

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[47] Quoted at U. S. Br. 34, n. 16. The reference therein to Hough, *Precedents in Military Law* (London 1855) 629 is to the case of a wife who in 1831 was sent to the Supreme Court of Calcutta; and who was discharged when the grand jury found no true bill; her triability by court-martial has only the authority of the compiler's say-so. However, it should be noted that, at this time, there was a special Mutiny Act applicable to India. St. 4 Geo. IV, ch. 81.

subject to trial by court-martial simply because they were accompanying their husbands.

Indeed, it is recorded that, in 1947, after the declared end of World War II hostilities, The Judge Advocate General of the Army "made a policy decision that military jurisdiction over such dependents [i.e., wives and children of service personnel] would not be exercised in spite of the fact that they were 'accompanying' . . . the armies of the United States without the territorial jurisdiction of the United States'." Aycock and Wurfel, *Military Law under the Uniform Code of Military Justice* (1955) 60. Not until 1950 was the good name of the United States Army sullied by the court-martial of an unarmed dependent wife—and even then the trials took place in occupied territory where, see pp. 73-76 *infra*, the court-martial was functioning as a military government court.[48]

Indeed, the strangest aspect of this and its companion case, No. 713, is that the reversal of the traditional policy with respect to the treatment of dependent wives has actually taken place under color of the Uniform Code of Military Justice—the act by which Congress sought to meet and dispose of continuing criticisms of the administration of military justice. Thus there is presented this unedifying paradox, that whereas for nearly 175 years no civilian wife of an American serviceman was ever tried by an American court-martial, now, in consequence of a reformed procedure and jurisdiction evoked by persisting

[48] "In case number 340593 Audrey L. Aguaya, a dependent wife, was tried in Japan on 10 February 1950 on a charge of larceny, committed in December 1949. She was convicted and sentenced to six months confinement, which was suspended. In case number 351230, Fumie Okitsu Hilton, a dependent wife, was tried at Osaka, Japan, on 18 January 1952 for unlawful possession of drugs, an offense committed 11 December 1951. Upon conviction she was fined $100, and sentenced to three months confinement, which was suspended." Respondent's reply brief in *United States ex rel. Krueger* v. *Kinsella*, H. C. No. 1726, S. D. W. Va., at p. 7. Even casual reading between the lines strongly suggests that both trials were on an *in terrorem* basis.

criticism of military trials of persons in uniform, civilian wives are not only being tried by court-martial, but the practice is defended as necessary, as proper, and (U. S. Br. 29, 31) as an element of service morale!

3. *Madsen* v. *Kinsella*, 343 U. S. 341, insofar as it spoke of the concurrent jurisdiction of a general court-martial to try Mrs. Madsen, was dictum, but, in view of the military government powers of such a tribunal (*infra*, pp. 73-76), was dictum irrelevant here. On the further issue of the camp-follower jurisdiction conferred by AW 2(d), the case seems not to rise even to the level of dictum.

All the court said on the latter point was that Mrs. Madsen fell within the terms of AW 2(d).[49] But the constitutionality of AW 2(d) as applied to civilian wives in time of peace, the critical question here, was not even mentioned. Indeed, far from attacking the validity of AW 2(d), Mrs. Madsen was urging that she could only have been tried by court-martial. Thus the issue that is in this case was not presented there, much less contested, with the result that *Madsen* v. *Kinsella* is to that extent valueless as a precedent; it did not present an earnest controversy on the point. *Gaines* v. *Relf*, 12 How. 472, 537-538, 539 (6th).

4. It is true that the legislative history of Art. 2(11), UCMJ, reflects at least some expression of intention to subject dependent wives to trial by court-martial. House Hearings, pp. 876-877, quoted at U. S. Br. 39-40; 96 Cong. Rec. 1357.[50] But since the constitutional issue was not

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[49] Possibly this disposed of the doubt expressed on that issue by the Fourth Circuit below, 188 F. 2d at 274-275.

[50] "MR. KEM. I should like to ask a question in regard to subsection (11) of Article 2, to which the Senator has just made reference. * * * Am I correct in interpreting subsection (11) to mean that a wife who accompanies her husband, who is a member of the

mooted, let alone explored, that circumstance can scarcely be deemed weighty, least of all when it is borne in mind that every other camp follower tried by court-martial had some obvious functional connection with the military.

5. All of the civilian camp followers who were tried by court-martial through June 1945, had, as was noted above, p. 62, some functional connection with the Army (4 Bull. JAG 223-229), and the same is true of those whose cases came before the civil courts.[51]

In time of peace, however, not even clear functional connection with the forces is sufficient to confer court-martial jurisdiction over civilians, as the instance of the post trader demonstrates (*supra*, pp. 45-47). And when Congress by Sec. 16 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 596, attempted to subject civilian contractors

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armed forces, to a point outside the continental limits of the United States, would be subject to this code?

"MR. KEFAUVER. If a wife accompanies her husband outside the continental limits of the United States and outside the Territories listed in subsection (11), * * * she will be subject to the uniform code as presented in this bill, just as she is subject to the military code today."

[51] *Gerlach*, *supra* note 30 (mate on Army transport); *Falls*, *supra* note 30 (cook on Army transport); *Mikell*, *supra* note 30 (auditor in constructing quartermaster's office); *Jochen*, *supra* note 30 (quartermaster employee); *Berue*, *supra* note 31 (seaman on ship carrying supplies for Army); *Perlstein*, *supra* note 31 (air-conditioning mechanic ashore in connection with salvage operations in harbor); *DiBartolo*, *supra* note 31 (aircraft mechanic); *McCune*, *supra* note 31 (cook on Army transport); *Shilman*, *supra* note 31 (merchant seaman; fine imposed by court-martial not sustained); *Weitz*, *supra* note 32 (employee of civilian contractor; military jurisdiction not sustained); *Walker*, *supra* note 32 (engineer employee in Panama; military jurisdiction not sustained); *Mobley*, *supra* note 34 (post exchange employee); *Grewe*, *supra* note 34 (mechanical engineer with Army engineers); *Rubenstein*, *supra* p. 50 (status unclear; remanded for more precise determination).

Probably the most tenuous functional connection with the forces was in *Perlstein*, where certiorari was granted. But, as is pointed out above, p. 34, the termination-of-jurisdiction feature of the case may have been a more decisive factor in obtaining review.

furnishing supplies to the Army to trial by court-martial, the measure was held unconstitutional. *Ex parte Henderson*, Fed. Case No. 6349 (C.C.D.Ky.).[52] Yet, if direct connection with the forces is to be the criterion, then obviously contractors and even post traders are more directly connected with the maintenance of an armed force than are the wives of any of its members.

6. The fallacy in appellant's argument that a dependent wife's presence abroad and her enjoyment of military amenities somehow subjects her to military trial will be more readily apparent if it be supposed that appellee had simply been sent to Hawaii. For if "Hawaii" is substituted for "England" and appropriate substitutions are made elsewhere, then appellant's position is this (U. S. Br. 31):[53]

> "Appellee was *in Hawaii* because her husband, a member of the United States Air Force, was sent *to Hawaii* in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces stationed *in Hawaii* to permit their families to accompany them. * * * Plans for and the cost of her transportation to *Hawaii* had been arranged and provided by the Air Force. She travelled by military surface transport. After arrival in *Hawaii*, appellee and her husband were assigned public quarters and she was issued appropriate authorization for commissary and post exchange privileges. She was accorded the use of, and did use, military medical facilities (R. 31)."

Is a dependent wife in Hawaii so intimately a part of the Air Force there so as to be subject to trial by court-

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[52] This ruling is erroneously attributed to 1878 at 11 Fed. Cas. 1067. In fact, see Winthrop *143, *145 (reprint, pp. 105, 106), the decision was rendered in 1866. The editors of the Federal Cases appear to have confused the date of the decision with the date that the opinion was certified by the Clerk of the court, 11 Fed. Cas. at p. 1078.

[53] Substituted words are italicized.

martial? Her relationship is just as close—and just as distant—as appellee's was to the Air Force while in England, or, for that matter, precisely the same as the relationship to the armed forces of any dependent wife on any military, naval, or air installation within the United States.

Such a dependent wife would be transported to any station in the continental United States at public expenses and, when necessary or appropriate, by military transportation. And all of the military amenities afforded appellee in England, on which such stress is laid—public quarters, commissary and post exchange privileges, military medical facilities—were and are equally available to every Air Force wife who accompanies her husband to Bolling Air Force Base and lives with him there.[54]

It is said (U. S. Br. 31-32) that "In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2(11) are part of the American military contingent abroad." Possibly in the eyes of the civilian community, and of the editor of the society page of the newspapers, the wives of the officers quartered at Fort Myer, at the Naval Gun Factory, and at Bolling Air Force Base, are part of the "service set" and so, figuratively, a part of the armed forces. But that figure of speech hardly subjects them to trial by court-martial.

Thus appellant's contention that court-martial jurisdiction can be exercised over accompanying civilians must rest, not on the emoluments they receive, but on one of two propositions: Either such civilians lose constitutional protections when they go overseas, or else the court-martial

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[54] See, for an authoritative listing of the benefits available to Air Force dependents, Air Force Manual 34-4, *Personal Affairs of Air Force Personnel and Aid to Their Dependents*. To the extent that facilities are available, no distinction is drawn between dependents in the United States, or in its overseas possession, or in foreign countries.

power expands when it is exerted away from home. Those matters are discussed below, pp. 81-86.

7. Here the immediate point to be considered is appellant's proposition that marriage to a man in uniform makes a woman a part of his armed forces, a proposition that is repeated several times in several ways (U. S. Br. 31-32, 39, 43, 47), apparently in the hope that repetition, like advertising, will, if indeed it does not convince the reader, somehow overwhelm him in the end.

In actual fact, this appellee, a young dependent wife, the mother of two small children already born and carrying a third (*supra*, p. 4), was no more a part of the United States Air Force than if she had been quartered on any Air Force Base in the United States. And appellant's continued, intensified effort to torture constitutional provisions through the reiteration of rhetorical hyperboles requires a second invocation of Mr. Justice Holmes' admonition: "As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." *Guy* v. *Donald*, 203 U. S. 399, 406.

In 1952, the Solicitor General advised this Court in the *Madsen* case (U. S. Br., No. 411, Oct. T. 1951, p. 51), "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops."

Nowhere in any of the passages setting forth reasons why dependent wives must now be tried by court-martial (U. S. Br. 31-32, 37-39, 42-43, 47-48) does appellant even attempt to explain how, and wherein the international situation has so deteriorated since 1952 as to require a

complete reversal of the position that the Government then presented to this Court on the precise question now in issue.

No such explanation, it is submitted, could be furnished. A hundred and seventy-five years of unbroken American precedent are conclusive in denying that the wife of a soldier is a part of the Army. On this point history is at one with logic and experience alike. It follows that a dependent wife may not be tried by court-martial in time of peace. *Toth* v. *Quarles*, 350 U. S. 11, 15.

E. The Power to Try Civilians by Court-Martial in Occupied Territory Rests on the War Power and on a Statute Giving General Courts-Martial the Powers of Military Government Tribunals, and So Cannot Justify Such Trials in Non-Occupied Territory, as in the Present Case

Appellee's "curt dismissal" (U. S. Br. 44) of *Madsen* v. *Kinsella*, 343 U. S. 341, and of similar decisions sustaining the jurisdiction of courts-martial over civilians in occupied territory was and is based on the recognition that such trials rest, first, on the war power (Clause 11 of Section 8, Article I) and, second, on the statutory provisions giving to general courts-martial all the powers of military government courts (AW 12 of 1916, 1920, and 1948; Art. 18, UCMJ; *infra*, pp. 124, 125).

Appellant's argument under this heading (U. S. Br. 30, 42-45, 48) reflects a confusion engendered by his failure to appreciate the constitutional basis for military occupation of enemy territory as well as by his overlooking the controlling statutory provision involved. His reliance on the *Madsen* case (U. S. Br. 41-45), and particularly his statement (U. S. Br. 43) that "it would be hard to say whether the difficulties of dealing with a prostrate Germany prior to a formal declaration of peace presented a more or less fitting occasion for application of the war power than did the continuing tensions of war and threatened war which formed the background and basis for Mrs. Covert's

sojourn in England", strongly suggest that it would be helpful to review the basis and the scope and the consequences of the war power, in order to dispel the verbal fog which surrounds those matters in appellant's brief.

1. Even in domestic territory, the war power has the broadest kind of scope. The power granted Congress by Clause 11 of Article I, Section 8, "To declare War", is, as this Court has said, "a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 426; *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

And the decisions of this Court establish the well-nigh transforming sweep of the war power, with respect to the evacuation of citizens (*Hirabayashi* v. *United States, supra; Korematsu* v. *United States*, 323 U. S. 214); with respect to limitations on the exercise of normal property rights (*Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503), even after the close of hostilities (*Woods* v. *Miller Co.*, 333 U. S. 138); with respect to the non-compensability of property destroyed by the United States in the course of military operations (*United States* v. *Caltex*, 344 U. S. 149); and with respect to the subjection of individuals, regardless of citizenship, to trial by military tribunals on American soil for violations of the law of war (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1).[55]

All of these cases uphold governmental acts that would not possibly have been valid in time of peace; all are therefore authority for the vast and vital distinction under our Constitution between war and peace.

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[55] Although Yamashita was tried in the Philippines, those islands were then still under the American flag, and the ruling brought here for review was that of the Supreme Court of the Commonwealth of the Philippines.

2. The war power is also the source of the President's power as Commander-in-Chief to deal with occupied territory. *Cross* v. *Harrison*, 16 How. 164; *Leitensdorfer* v. *Webb*, 20 How. 176; *Santiago* v. *Nogueras*, 214 U. S. 260; *Alvarez y Sanchez* v. *United States*, 216 U. S. 167. During the Civil War, in which the South was accorded belligerent rights; the same power was exercised in those portions of the Confederacy under Union control. *The Grapeshot*, 9 Wall. 129; *Burke* v. *Miltenberger*, 19 Wall. 519; *New Orleans* v. *Steamship Co.*, 20 Wall. 387; *United States* v. *Dickelman*, 92 U. S. 526. On occasion, as when the British occupied a part of Maine in 1814, the United States has been on the other side of military government. *United States* v. *Rice*, 4 Wheat. 246. And within the past decade there has been a striking illustration of the duty of the military occupant as a matter of international law to maintain public order in the territory that he occupies, *In re Yamashita*, 327 U. S. 1, although the existence of that duty had long been recognized by this Court. *The Grapeshot*, 9 Wall. 129, 132-133; *Neely* v. *Henkel*, 180 U. S. 109, 121.

But the significant point—which appellant (U. S. Br. 43, quoted *supra*, pp. 69-70) obviously misses—is that whereas the military occupant under the war power acts regardless of and against the will and indeed the armed force of the occupied power, since he proceeds by right of conquest (*MacLeod* v. *United States*, 229 U. S. 416), the stationing of troops in the territory of another friendly power requires the latter's consent. Thus here, as well as in Japan after the Treaty of Peace became effective in 1952 (see discussion at pp. 11-12 of Respondent's Brief in No. 713), American forces were not stationed abroad by right of conquest under the war power.

3. It is also imperative to recall that when the United States proceeds to occupy enemy territory under the war power, Americans whose persons or property are found in territory so occupied are, normally and usually,

accorded only the rights of other inhabitants of such territory. Thus it is well settled that American property found in occupied enemy territory so far partakes of enemy character that the American owner is not entitled to compensation when it is taken by the United States. E.g., *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 305-306; *Miller* v. *United States*, 11 Wall. 268; *The Venus*, 8 Cranch 253. And an American present in occupied territory is subject to trial by a non-jury tribunal established by American military government. *Madsen* v. *Kinsella*, 343 U. S. 341; *Neely* v. *Henkel*, 180 U. S. 109.

Accordingly, when a statute so provides, an American who commits an offense in territory occupied by the United States can be extradited to such territory, there to be tried by a military government tribunal. *Neely* v. *Henkel*, *supra*. The reason is that he is being tried for a violation of foreign law (*Madsen* v. *Kinsella*, *supra*, 343 U. S. at 356). Thus, Mrs. Madsen was tried, although by an American military government tribunal, for a violation of the German Criminal Code (343 U. S. at 342-343, 344), while Neely was extradited to face a similar tribunal for violations of the Penal Code of Cuba that had been in force from Spanish days, as well as for transgressing provisions of the Postal Code promulgated by the American military governor (180 U. S. at 112-113, 118-119). Neither had, under the law of Germany or Cuba, any right to a jury, even though such law was being administered by the United States for the time being in the exercise of its war power. The statute providing for extradition to occupied territory is permanent legislation, now 18 U. S. C. § 3185, but when the occupation ceases, the war power no longer operates, and the right to extradite also ceases. *In re Kraussman*, 130 F. Supp. 926 (D. Conn.).

Thus, when an American citizen goes into territory that is under American occupation, he so far becomes an inhabitant of that territory as to subject his property to seizure, and his person to non-jury trial. *Miller* v. *United*

States, 11 Wall. 268, 305-306; *Iyraqua Iron Co. v. United States*, 212 U. S. 297; *Neely v. Henkel*, 180 U. S. 109; *Madsen v. Kinsella*, 343 U. S. 341. The United States is military sovereign there. Plainly, no such consequences follow simply because, with the consent of the foreign nation, American troops and their dependents are stationed in that nation's territory.

Nor does it follow that the power to extradite to occupied territory for trial by a military tribunal there (*Neely v. Henkel*, 180 U. S. 109) is equivalent to a power to try by military tribunal in the United States without such extradition. Such a contention would be on a par with an argument that, simply because the United States has an extradition treaty with say, Turkey, the person to be extradited could be tried in the United States by Turkish law under such personal guarantees as that law affords.

4. So much for constitutional background. It remains to consider the Congressional scheme of implementing the judicial powers of the United States in its capacity as a military occupant, and to illuminate what appellant has wholly neglected to consider.

Ever since 1916, an Army general court-martial has had, in addition to its powers to try persons subject to military law, jurisdiction to try "any other person who by the law of war is subject to trial by military tribunals." AW 12 of 1916; AW 12 of 1920; AW 12 of 1948 (*infra*, p. 124); see *Madsen v. Kinsella*, 343 U. S. at 350-352. An identical provision applying to all of the armed services is now in force as Art. 18, UCMJ, *infra*, p. 125.

Consequently, any trial by court-martial of an accompanying civilian can, if such trial takes place in occupied territory, even after the cessation of hostilities, be justified as an exercise of the war power, and specifically of so much of that power as Congress has by statute conferred upon courts-martial. It is this principle, not the

much broader proposition advanced by appellant (U. S. Br. 41 *et seq.*) that explains *Madsen* v. *Kinsella* and his other occupied territory cases (*supra* note 34). It is this principle for which the President's power as Commander-in-Chief (U. S. Br. 48, n. 26) can alone be properly invoked. It is likewise this principle that supports numerous cases wherein the Court of Military Appeals sustained court-martial jurisdiction over civilians in occupied territory.[56] And it is this same principle that fully sustains the dictum in *Madsen* v. *Kinsella*, 343 U. S. at 343, 351-355, 365-366, that there was concurrent jurisdiction in an Army general court-martial to try Mrs. Madsen in occupied Germany: Such a court-martial could have tried her as a military tribunal under the law of war, viz., a military government court, under AW 12 of 1948 (now Art. 18, UCMJ), and therefore had full and complete constitutional jurisdiction pursuant to that provision.[57]

It would be possible to argue that the power to punish offenses committed by civilians in occupied territory is an exercise of the power conferred by the concluding portion of the Piracy Clause, Clause 10 of Article I, Section 8, "To define and punish * * * Offences against the Law of Nations." There is language in *Ex parte Quirin*, 317 U. S. 1, 27, which is perhaps susceptible to that interpretation if the expression, "law of war", is broadly construed —though the present problem was assuredly not then before the Court.

But, whether the punishment of crimes committed by civilians present in occupied territory is properly listed under Clause 10, or whether it is more appropriately classified under the War Power, Clause 11, it is in any

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[56] *United States* v. *Marker*, 1 USCMA 393, 3 CMR 127; *United States* v. *Schultz*, 1 USCMA 512, 4 CMR 104.

[57] Insofar as the dictum dealt with the powers of the court-martial under AW 2(d) of 1916 and thereafter (now Art. 2(11), UCMJ), it was dealt with above, p. 64.

event certain that the military trial of civilians in occupied territory is not, as appellant seems to think (U. S. Br. 30, 42-45, 48), an exercise of the Clause 14 power "To make Rules for the Government and Regulation of the land and naval Forces." It could not be. The power over occupied territory is limited only by accepted principles of international law, by the generally accepted standards of civilized nations (e.g., *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393-394), while the power to govern the armed forces is a branch of municipal law, and thus varies in the details of its application from country to country, according to each nation's laws and constitution (if any). See Chase, C. J., in *Ex parte Milligan*, 4 Wall. 2 at 141-142. Moreover, the power to govern the armed forces is a power that can always be exercised, in time of piping and perfect peace as well as in time of war, at home as well as abroad, in friendly as well as occupied territory; while the war power, certainly in its aspect of abridging individual rights, is restricted to time of war, and to occupied territory.

True, as appellant says (U. S. Br. 45), "formal war does not exhaust the occasions for the exercise of the war power." It may be invoked to construct facilities before a war (*Ashwander* v. *TVA*, 297 U. S. 288), to retain after a war the property of alien enemies seized during its pendency (*Silesian-American Corp.* v. *Clark*, 332 U. S. 469), and to memorialize a war long after it is over (cf. *United States* v. *Gettysburg Elec. R. Co.*, 160 U. S. 668). But it has never been suggested, at least prior to the time that the present case arose (U. S. Br. 45), that the power to try civilians by court-martial in time of war and in conquered territory likewise sustains a similar jurisdiction in time of peace and not in occupied territory.

Appellant's argument (U. S. Br. 42-43, 64) that blandly analogizes the unquestioned power to try civilians in occupied Germany (*Madsen* v. *Kinsella*, 343 U. S. 341) and in occupied Cuba (*Neely* v. *Henkel*, 180 U. S. 109) with the

asserted power to similarly try civilians within the territory of friendly receiving powers, England in this case and Japan in that of Mrs. Smith (*Kinsella* v. *Krueger*, No. 713), not only reflects an utter unawareness of international law as expounded by this Court for more than a century, it also blurs the transcendent distinction between peace and war that, as has been shown above, pp. 70-73, is so fundamental in the Constitution of the United States.

Since, then, the war power does not sustain the asserted jurisdiction, where does it rest? Are there any other clauses that support it? Appellee turns to a consideration of those questions: The scope of the Fifth Amendment, the extent to which the Bill of Rights is operative overseas, and the question whether the court-martial power expands when it passes the national boundaries.

F. Nothing in the Fifth Amendment Enlarges the Grant of Court-Martial Jurisdiction Contained in Article I of the Constitution

As has been seen, pp. 52-60, *supra*, the constitutionality of extending court-martial jurisdiction to overseas civilians in time of peace was never questioned, either in 1916 or in 1950. And the most likely explanation for the veritable anesthesia that overcame all concerned is that it was simply assumed without question that, since the resultant trials were "cases arising in the land or naval forces" within the Fifth Amendment, they had a constitutional basis. Inquiry into the inarticulate premises underlying this assumption requires reexamination of the ground covered in *Toth* v. *Quarles*, 350 U. S. 11, which disposed of all attempts to recapture a military jurisdiction once lost by change from military to civilian status.

The earliest recapture provision was that contained in Section 2 of the Act of March 3, 1863, c. 67, 12 Stat. 696, 697, which was first codified as AW 60 of 1874 and AGN

14 (Eleventh): it purported to authorize the trial by court-martial of discharged or dismissed personnel in certain cases of fraud. In time it became, on the Army side, AW 94 of 1916, 1920, and 1948, and eventually it was made applicable to all of the armed forces in all serious cases beyond the jurisdiction of civilian tribunals as Art. 3(a), UCMJ.

Nothwithstanding the doubts expressed by Winthrop (*144-146; reprint pp. 105-107), the constitutionality of these provisions was long upheld by the lower federal courts. Their reasoning was that, although the accused had become an ex-soldier, ex-sailor, or ex-airman, and so was a civilian at the time of trial, his case arose while he was still in uniform, with the consequence that he fell within the exception to the guarantee of indictment by grand jury in the Fifth Amendment, viz., "except in cases arising in the land or naval forces." See *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D.Calif.); *Kronberg* v. *Hale*, 180 F. 2d 128, 130 (C.A. 9), certiorari denied, 339 U. S. 969; *Talbott* v. *United States ex rel. Toth*, 215 F. 2d 22, 26 (D.C.Cir.) (the *Toth* case below).

A similar rationale was relied on in the rulings sustaining court-martial jurisdiction over discharged soldiers held in military prisons (16 Op. Atty. Gen. 292; *In re Craig*, 70 Fed. 969 (C.C.D.Kan.), relying on *In re Bogart, supra*). So too, the *Manual for Courts-Martial*, for many years and through many editions published under different auspices, pointed to the Fifth Amendment as a source of military jurisdiction. See MCM, 3d ed. 1893, by Lt. Murray of the Artillery, p. 2; the following editions, all published by the War Department: 1895, p. 4; 1901, p. 6; 1905, p. 6; 1908, p. 6; and the following editions, prescribed by the President: 1917, ¶ 1; 1921, ¶ 1; 1928, ¶ 1; 1949, ¶ 1; 1951, ¶ 1. Commentators, likewise, espoused the view that the boundary of military jurisdiction was to be found within the contours of the Fifth Amendment, their view being

that inquiry in each instance was limited to ascertaining whether the particular case had arisen in the land or naval forces. E. g., Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107.[58]

This easy assumption was exploded by *Toth* v. *Quarles*, 350 U. S. 11, 14, where the Court specifically ruled that the Fifth Amendment "does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces." While the foregoing appeared in a footnote; it was plainly essential to the holding, as the dissent on that point (350 U. S. at 37-42) was at pains to set forth.

A moment's reflection should suffice to establish both the correctness of the ruling on this point in the *Toth* case and the unsoundness of the prior assumption.

It is a matter of undoubted historical fact that adoption of a Bill of Rights was the price exacted by the several conventions as a condition of the Constitution's ratification, as this Court has had occasion to recognize. *Barron* v. *Baltimore*, 7 Pet. 243, 250. And see, for a recent study, Rutland, *The Birth of the Bill of Rights, 1776-1791* (1955), especially c. VIII, "The Great Compromise." The first Ten Amendments, plainly, were designed as limitations on the powers of the new general government; how, then, could anything in them possibly enlarge powers which the Constitution had granted to that government?

Independent research fortifies the construction of the Fifth Amendment found in *Toth* v. *Quarles*, 350 U. S. 11, 14.

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[58] Present counsel, who expressed the same opinion (Wiener, *A Practical Manual of Martial Law* (1940) §§ 129-130), carefully refrains from casting any stones.

Massachusetts and New Hampshire, in their several instruments of ratification, proposed an amendment reading as follows (1 Elliot's *Debates* 323, 326; 2 *id.* 177):

> "VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."

New York's proposal was in these terms (1 *id.* 328):

> "That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; * * *."

A slightly different formulation was offered by three other states, North Carolina (4 *id.* 243), Rhode Island (1 *id.* 334), and Virginia (3 *id.* 658):

> "8. That, in all capital and criminal[59] prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces); nor can he be compelled to give evidence against himself."

Plainly, the text of the Fifth Amendment as adopted varies the language of the above proposals. That variance was not, so far as the Annals of Congress disclose, debated in the House; and the veil of the executive sessions wherein all Senate business was done in those days is not pierced by anything recorded in *The Journal of William Maclay*, as Senator Maclay went home ill on the day that

[59] In the Virginia version, these words were transposed to read "criminal and capital".

the Amendments were scheduled for Senate discussion (pp. 131, 141-142).

In an analogous situation, this Court has refused to give controlling effect, in construing the original Constitution, to revisions made by the Committee on Style, where textually such revisions appeared to vary a widely held understanding. *Ex parte Grossman*, 267 U. S. 87, 113.

So here: It is hardly likely that, with six out of the original thirteen states insisting on the exception as extending to cases arising in the government of the land and naval forces, the Fifth Amendment as adopted would have conveyed to the Congress and to the States, late in the Eighteenth Century, a context that would have enlarged the grant of court-martial power so as to make it extend to any cases arising in the land and naval forces that did not involve the government of those forces. Consequently, the tenor of the several states' proposals conforms to the interpretation placed on the Fifth Amendment's exception in *Toth* v. *Quarles*, 350 U. S. 11, 14.

As Mr. Justice Holmes said in *Gompers* v. *United States*, 233 U. S. 604, 610, in words that bear constant repetition:

> "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

The origin of the Fifth Amendment plainly shows that those who framed and adopted it never for a moment intended it to enlarge the carefully formulated grant in Clause 14 of Section 8 of Article I. "To make Rules for the Government and Regulation of the land and naval Forces." Unless, therefore, a given individual falls within the four corners of Clause 14, he—or she— cannot be sub-

jected to trial by court-martial by reason of anything contained in the Fifth Amendment.

G. The Power to Govern the Armed Forces in Time of Peace Does Not Become Any Broader Simply Because Exercised Outside the Continental Limits of the United States

Appellant argues that Winthrop and the earlier opinions of The Judge Advocate General are not controlling because, so it is said, they were dealing with cases arising in the continental United States (U.S. Br. 44-45; but see p. 42 *supra*), whereas the military jurisdiction now asserted is limited to civilians located overseas. And later appellant asserts (U. S. Br. 61-65) that the provisions of the Bill of Rights are simply not applicable to the extraterritorial jurisdiction now asserted by the United States.

Appellee has already dealt with the powers exerted by courts-martial in occupied territory where they function as military government tribunals (*supra*, pp. 73-76). Under this heading she will consider first the soundness or otherwise of the appellant's contentions that rest on extraterritoriality. That inquiry divides itself into two facets: First, is it true that an American civilian cannot invoke the Bill of Rights when faced with action by American officers overseas? Second, assuming that he cannot, so that he must stand trial in, say, an American consular court, does it follow that the court-martial power under Clause 14 has wider scope abroad, permitting it there to be applied to persons who are not, in a constitutional sense, a "part" of the armed forces?

1. Appellant (U. S. Br. 61-65; and see *Burney* Appendix, pp. 55-58) relies primarily on so much of *In re Ross*, 140 U. S. 453, decided in 1891, as states (p. 464) that "The Constitution can have no operation in another country," and on the holding of that case, which was that an American could properly be tried by an American consular court, sitting without a jury in Japan, for a murder committed

on an American ship in Yokohama harbor. Thus the Fifth and Sixth Amendments were held inapplicable.

It would be interesting to speculate whether and to what extent the language and indeed the holding of the *Ross* case, decided seven years before the United States spread beyond the limits of the American continent and when war was thought to be on the verge of disappearance,[69] is still law today. We know that, after the Insular Cases (*Di Lima* v. *Bidwell*, 182 U. S. 1; *Dooley* v. *United States*, 182 U. S. 222; *Downes* v. *Bidwell*, 182 U. S. 244; *Dooley* v. *United States*, 183 U. S. 151; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176) had been decided by a badly split and even fractionalized Court, it was held, with somewhat more agreement, that the guarantee of jury trial did not extend *ex proprio vigore* to newly acquired territory not incorporated within the United States where such trial had not formed a part of the new possession's ancient institutions. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Balzac* v. *Porto Rico*, 258 U. S. 298. But, even so, it was always made plain that certain basic constitutional protections followed the flag none the less. *Downes* v. *Bidwell*, 182 U. S. 244, 276-277 (First Amendment; right to own property); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312-313 (Fifth Amendment).

And the trend has been markedly in favor of extending not only constitutional guarantees but also constitutional powers. The change in emphasis, with respect to the scope of constitutional protection, that separates *Hawaii* v. *Mankichi*, 190 U. S. 197, from *Duncan* v. *Kahanamoku*, 327 U. S. 304, far transcends the purely technical aspects of "incorporation." The Fifth Amendment is now held to apply in Puerto Rico of its own force (*Arroyo* v. *Puerto Rico Transp. Authority*, 164 F. 2d 748, 750 (C.A. 1)), and like-

[69] "The aspirations of the world are those of commerce. Moralists and philosophers, following its lead, declare that war is wicked, foolish, and soon to disappear." Holmes, *The Soldier's Faith* (1895), in *Speeches*, 56.

wise to be applicable in the Virgin Islands (*Alton* v. *Alton*, 207 F. 2d 667 (C.A. 3), vacated because moot, 347 U. S. 610; *Granville-Smith* v. *Granville-Smith*, 214 F. 2d 820 (C.A. 3), affirmed on other grounds, 349 U. S. 1), although neither possession has ever been declared an incorporated territory. The First Circuit, significantly enough, has held that the Fourth Amendment controls American officers abroad. *Best* v. *United States*, 184 F. 2d 131, certiorari denied, 340 U. S. 939. Treason, the only crime defined by the Constitution, can be committed by Americans abroad. *Kawakita* v. *United States*, 343 U. S. 717; *Chandler* v. *United States*, 171 F. 2d 921 (C.A. 1), certiorari denied, 336 U. S. 918; *Burgman* v. *United States*, 188 F. 2d 637 (D.C. Cir.), certiorari denied, 342 U. S. 838. And the power of Congress to enact legislation applicable to Americans abroad "is one of construction, not of legislative power." *Blackmer* v. *United States*, 284 U. S. 421, 437. The broad generalization from the *Ross* case, 140 U. S. at 464, "The Constitution can have no operation in another country", plainly cannot stand today without qualification.

Certainly it cannot be taken literally. Whenever our troops are stationed abroad, the President does not cease to be their Commander-in-Chief (Art. II, Sec. 2). And to the extent that offending members of our forces are tried by court-martial, Clause 14 of Sec. 8 of Art. I is, plainly, operating in another country. And so, on at least three modern occasions, this Court has been careful to qualify the statement from *In re Ross*, *supra*, so that it reads—with italics added—"Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens*." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *United States* v. *Belmont*, 301 U. S. 324, 332; *United States* v. *Pink*, 315 U. S. 203, 226.

Why, then, should not the guarantees of Article III, Sec. 2, and of all the Bill of Rights, be available to an

American civilian in time of peace when he is abroad in non-occupied territory, when officers of the United States Government seek to deal with him? In that situation, where the war power cannot be exerted (compare, as to occupied territory, *Madsen* v. *Kinsella*, 343 U. S. 341, and the discussion above, pp. 73-76), it is difficult to see why certain affirmative constitutional grants of power are deemed available for export, while constitutional protections, including all of the Bill of Rights, must stop at the water's edge.

If Congress were now to provide for consular or other non-jury courts to try American civilians accompanying the armed forces in time of peace in non-occupied territory abroad, then the continued validity of *In re Ross*, 140 U. S. 453, would be squarely in issue, and all would learn whether its mention in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, is any better guaranty of its continued vitality than was the recital, in the same decision, of the supposed status of the courts of the District of Columbia.[61]

But that intriguing question is not presented by the case at bar. The question here is not whether this appellee could claim the protection of the Fifth and Sixth Amendments as against a consular or other non-jury court. Nor is the question whether this appellee, as a civilian, can claim any constitutional rights, whether under the Fifth or Sixth or Eighth or any other Amendment, as against a tribunal having power to try her. The question for decision is not simply a proposal (*Burney* Appendix, p. 57) to "substitute the words 'military courts-martial' for the words 'consular tribunals'." The issue here is whether courts-martial, wherever located, have been given power to try civilians in time of peace at all. Otherwise stated, the question concerns not the protection afforded the accused

[61] It was said in *Bakelite*, at p. 450, that these courts were legislative courts. Only four years later, however, it was squarely ruled that the courts of the District of Columbia were constitutional courts. *O'Donoghue* v. *United States*, 289 U. S. 516.

by the Bill of Rights, but the power conferred by the Constitution itself upon the tribunal before which she is haled.

This is a problem to which, perhaps understandably, neither appellant nor the *Burney* Appendix ever face up squarely.

It has been shown that, by understanding preceding even the adoption of the Constitution itself, and by unbroken practice for much more than a century thereafter, civilians were never subjected to trial by court-martial in time of peace, but only in time of war when in the field. That may be taken as reflecting a consistent, settled, and hence authoritative construction of the power "To make Rules for the Government and Regulation of the land and naval Forces."

Does that power somehow become broader in its scope once the national boundaries are left behind? Does the phrase "land and naval Forces" have a wider content overseas? The Continental Congress, which sent Arnold and Montgomery to capture Montreal and then on to the gates of Quebec, and which later sent John Paul Jones to harry the enemy's shipping in British waters, assuredly did not conceive of land and naval forces as limited to engagements or contests on home grounds. The notion of American forces overseas, therefore, can hardly have been absent from the Founders' contemplation.

Some military powers, true, are geographically circumscribed; the terms of the Militia Clause prevent the militia, as such, from being sent outside the country. 29 Op. Atty. Gen. 322. Other military powers are enlarged in time of war; the war power, though not unlimited (*United States v. Cohen Grocery Co.*, 255 U. S. 81), is well nigh plenary. See pp. 70-73, *supra*. And the power to govern the armed forces has always extended to civilian camp followers in time of war when they are in the field.

But nothing in the Constitution, and nothing in its history, enlarges the class of persons over whom the court-martial power can be exercised simply because that power is sought to be exerted beyond the three-mile limit.

Consequently, whatever may be the present validity of *In re Ross*, 140 U. S. 453, whatever may be the protections generally available to American citizens against acts of American officers committed abroad, it is plain that the power of a court-martial over civilians in time of peace is neither expanded nor enlarged by the circumstance that it sits outside the United States.

H. Disciplinary Considerations Underlying the Court-Martial Power Do Not Extend to Dependent Wives

In the *Toth* case, the Court said (350 U. S. at 17),

> "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."

Counsel cannot forbear to remark that the basic fighting purpose of the United States Air Force would be better served by more attention to the matter of our air supremacy and somewhat less to that of trying civilian women by court-martial.

And, further from the *Toth* opinion (350 U. S. at 22),

> "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."

That being true of ex-servicemen, it applies with greater force in the case of a woman who was never in the service at any time.

> "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service" (350 U. S. at 22).

As has been seen (*supra*, pp. 61-64), for 175 years the United States Army never deemed it necessary to court-martial wives in order to maintain discipline among its members.

> "Court-martial jurisdiction springs from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury" (350 U. S. at 22-23).
>
> * * * * *
>
> "We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution" (350 U. S. at 23).

Consequently this appellee, held in the District of Columbia jail (R. 1, 2, 5) for trial in the District of Columbia (R. 2, 8) is entitled to the protections accorded any other civilian so held for trial.

But, appellant urges (U. S. Br. 31-32),

> "In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2(11) are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of

> our armed forces overseas, as well as their continued acceptability to the host governments. It is, therefore, fitting that civilians who accompany the armed forces to foreign duty stations be subject to discipline under American military law."

Apart from the circumstance that the foregoing is again largely inflated with rhetoric, it contains as well demonstrable fallacies.

To begin with, the United States has large numbers of other civilian employees and dependents stationed abroad, whose actions similarly affect American standing in foreign eyes. Next, if the conduct of dependent wives presents grist for the disciplinary mills of the services, the misconduct of dependent adolescent children does likewise—and yet the Uniform Code of Military Justice is plainly unsuited to dealing with offenses committed by civilian juveniles. And, finally, once the actual figures are looked to, the problem of civilians overseas, which is blown up to such fantastic proportions in appellant's brief, is shown to be a very small matter that is easily manageable through normal and constitutional means.

First. Appellant states (U. S. Br. 29) that there are now 20,000 civilians employed and serving with the United States armed forces overseas, as well as approximately 250,000 civilian dependents; and that (U. S. Br. 30) "Misconduct by such civilians abroad, not less than misconduct by those in service, could cause international friction in areas where harmony and cooperation are of the highest importance."

But the United States has other civilian employees abroad as well. During January 1956, it had a total of over 204,000 such employees, other than foreign nationals, employed outside the continental limits, and of that number over 62,000 were employed by agencies other than the Department of Defense, of which more than 21,500 were employees of the Department of State. 102 Cong. Rec. 3494-3495

(daily ed., March 6, 1956). Included in the 62,000 non-Defense employees were some 15,000 persons employed by the Panama Canal, presumably in the Canal Zone, and doubtless others in the total (though probably not many of the State Department personnel) are also employed on American soil though outside the continental limits of the United States.

If, as appellant urges, the actions of the 20,000 Defense Department employees abroad affect discipline and reputation, why is that not equally true of the actions of other Government employees serving in foreign countries? No doubt many of the non-Defense employees are accompanied by their dependent wives and other relatives. If, then, it is important to insure a standard of conduct on the part of American civilians abroad under the auspices of the armed forces which will be conducive to (U. S. Br. 32) "their continued acceptability to the host governments," why is it not equally important to insure a similar standard of conduct by other American civilians who are abroad under auspices of other executive departments? If the reputation of the Air Force, and thus of the United States, can be affected by the conduct of a sergeant's wife, is there not equal danger to American reputation when the deviation from the desirable norm is committed by the wife of a Point Four administrator, or, for that matter, by the accompanying mother-in-law of a United States Information Agency executive? And could not the misconduct of American tourists equally (U. S. Br. 30) "cause international friction in areas where harmony and cooperation are of the highest importance"?

The fact is that all these groups stand on the same footing, without the slightest effect on the discipline of the armed forces, at which alone the Clause 14 power is directed.

Second. Dependent children of service personnel abroad, whether minors or otherwise, fall literally within the terms

of Article 2(11). They, like their respective mothers, are accompanying the armed forces of the United States overseas, and fall within appellant's contention (U. S. Br. 47) that "In today's circumstances, civilians accompanying the armed forces overseas, including dependents, are an intimate part of the American military contingent abroad." Assuming for the moment that this is so, what then shall be the test of criminal amenability for any such children who seriously misbehave?

The common law test, which held that a child under seven was conclusively presumed incapable of crime, while between seven and fourteen the presumption was rebuttable? See *Allen* v. *United States*, 150 U. S. 551, 558. Or the modern juvenile court rule, with its varying limitations? See D. C. Code (1951 ed.) §§ 11-906, 11-907, 11-914 (16, 18, and 21 years, as the case may be); and compare the federal provisions for the correction of youthful offenders, 18 U. S. C. §§ 5001, 5006(e) (21 and 22 years). The Uniform Code of Military Justice is silent on the point—for obvious reasons—nor does it contain the familiar juvenile court provision that conviction in such a tribunal does not affix a criminal record to the offending minor. D. C. Code (1951 ed.) § 11-915; 18 U. S. C. § 5021. Yet under appellant's arguments there is just as much reason to subject to trial by court-martial the misbehaving teen-age son of a serviceman abroad as there is to assert military jurisdiction over that serviceman's dependent wife.

Third. The problem of controlling civilian dependents, which is so inflated by appellant's verbalisms (U. S. Br. 31-32, 37-39, 42-43, 47-48) and, preeminently, by the impassioned prose of the *Burney* Appendix, pp. 75-78, needs only the sharp needle of fact to reduce it to its true proportions.

A. Of the 8300 cases docketed by the United States Court of Military Appeals through the end of March, 1956, only 37, or about four tenths of one per cent, involved accom-

panying civilians.[62] And some of those, exact number unknown, involved trials by courts-martial in occupied territory where such courts were exercising military government powers. See notes 48 and 56 and, generally, pp. 73-76, *supra*.

B. Even those 37 cases apparently involved many offenses of only minor concern, because only 6 civilians convicted by court-martial have, up to now, been turned over to the Attorney General for confinement in federal peral institutions, and the cases of two of those individuals are presently before this Court.[63] Again, it is not known whether the three persons not accounted for in note 63 were tried by courts-martial sitting in occupied territory.

The problem, therefore, is essentially a minor one. There is no compelling or practical reason whatever why accompanying civilians cannot be dealt with in recognized and constitutional ways. The proper alternatives that are available are briefly explored below, at pp. 102-107.

In any event, it is not necessary to prolong the discussion under Point III. The short of the matter is that, howsoever the problem is approached, the power to make rules for the government and regulation of the land and naval forces is not a power to govern or regulate the wives of members of those forces.

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[62] Figures supplied by the Clerk of that Court. 36 cases involved petitions for grant of review under Art. 67(b)(3), UCMJ, the other a certificate under Art. 67(b)(2).

[63] Figures supplied by the Bureau of Prisons, April 6, 1956. Of the 6 cases involving civilian prisoners serving sentences imposed by courts-martial, three were males and three were women: This appellee; Mrs. Smith (of No. 713), and the British subject, Mrs Brillhart, whose case is discussed *infra*, at p. 96.

The Bureau of Prisons further advises that only 5 such prisoners are now being held; the difference reflects appellee's transfer from Alderson to appellant's custody last July (R. 2, 8, 123).

IV. THE TREATY POWER IS COMPLETELY IRRELEVANT IN THE PRESENT CASE

Obviously unsure and uncertain of his contentions under the law military, appellant argues at length (U. S. Br. 48-61) that the Air Force's right to try appellee by court-martial within the District of Columbia can be supported as an exercise of the power to treat with foreign countries. Analysis of the pleadings, of the legislative history of Art. 2(11), and of the practice thereunder, shows that resort to the treaty power is an afterthought. Further, nothing in the exercise of treaty power relied on by appellant shows the slightest intention on the part of either of the contracting powers to enlarge in any way the jurisdiction of American courts-martial. And, finally, the treaty power must be exercised, so far as American citizens are concerned, within the limits of the Constitution, so that no treaty could authorize the trial of a civilian in the District of Columbia otherwise than by a jury.

These propositions will be expanded below.

A. The Invocation of the Treaty Power is an Afterthought, Supported Neither by the Pleadings in This Case, Nor by the Legislative History of Art. 2(11), Nor by the Practice Thereunder

It is well to recognize at the outset the scope claimed by appellant for the treaty power, viz., that if he fails to establish a sufficient basis for appellee's trial by court-martial as an exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces", he can somehow supply that deficiency by supporting such trial (U. S. Br. 48) "as an appropriate exercise by Congress of its power to enact legislation necessary and proper for carrying into execution those international agreements and treaties negotiated by the President whereby components of the United States armed forces stationed in friendly foreign nations are secured the right

to try all persons serving with, employed by, or accompanying those forces for offenses committed by them in such foreign lands for which they would otherwise be subject to trial in the courts of the country where they are stationed."

That this is a somewhat belated effort to shore up a faltering case can readily be demonstrated.

First. The Pleadings. True, par. XVIII of appellant's return and answer (R. 10-11) does mention the circumtance that the British authorities relinquished jurisdiction over appellee. That paragraph avers that the Act of the British Parliament known as the United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31, was based on the "assumption" that the United States military authorities would be able to try persons in appellee's situation. But after making every intendment in favor of appellant's return, as well as all allowances for the looseness of mid-20th Century pleading, it is impossible to draw from the paragraph in question even the outline of the argument now advanced, viz., that if the court-martial power is inadequate, the treaty power will somehow supply the necessary.

Second. The Legislative History. Far from reflecting any intention to base the jurisdiction asserted by Art. 2(11), UCMJ, upon the treaty power, the legislative history of that provision shows that that extraterritorial jurisdiction which, however mistakenly, was assumed to rest on the power to regulate and govern the armed forces, was limited so that it would not conflict with the assertion, by other countries where our forces might be stationed, of their own territorial jurisdiction.

That was the only purpose of adding to both Arts. 2(11) and Art. 2(12) their present opening clauses, viz., "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted

rule of international law." (See *supra*, pp. 57-58, and U. S. Br. 57-60.

That is likewise the only possible meaning of the sentence in the House Report quoted in italics at U. S. Br. 59, "we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements."

Consequently the introductory clause of Art. 2(11) is one of limitation, limiting conformably to treaty and in consonance with the claims of foreign countries a wider American jurisdiction that was based on the court-martial power. To that extent there was (U. S. Br. 57) a "recognition of the impact of proposed Article 2(11) on foreign affairs." But the legislative history of Art. 2(11) assuredly lends no support to views now formulated, to the effect that Congress in that provision was asserting a power that it considered to be based on treaty.[64] It is simply impossible to draw from the discussions concerning Art. 2(11), either at the hearings, in the Committee Reports, or on the floor of both houses (references *supra*, pp. 57-58) the treaty power argument that appellant now constructs, long after the event.[65] The legislative materials prove that Congress simply assumed that, in enacting Art. 2(11), it was

[64] The next sentence quoted from the House Report (U. S. Br. 59) is, "Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement." This is ambiguous; does the jurisdiction rest on obligations, or are the forces there pursuant to obligations? In any event, clause by clause analysis of Article 2 in the body of both Committee Reports discloses no reliance whatever on the treaty power.

[65] Appellant's failure to refer to such legislative history as seems to be in his favor (see note 50, *supra*) strongly cautions against accepting his reading of that history at face value.

combining and revising two existing statutes, AW 2(d) and 34 U. S. C. § 1201, and that it was enacting a Uniform Code of Military Justice in pursuance of its Clause 14 power to govern and regulate the armed forces.

Third, The Practice. The jurisdiction purportedly conferred by Art. 2(11), UCMJ, has in fact been exercised without reference to the terms of agreements with foreign countries, as the following examples show.

(i) In *United States* v. *Robertson*, 5 USCMA 806, 19 CMR 102, the accused, a merchant seaman, was a member of the crew of a Department of Commerce vessel allocated to the Military Sea Transportation Service. Accused's offense took place during the course of the Korean hostilities, but the vessel was not shown to have carried military personnel, it did not sail in convoy, and the cargo, while consigned to the U. S. Army in Japan, was not designed for immediate combat operations. Trial by court-martial followed the effective date of the Peace Treaty with Japan.

The Court of Military Appeals specifically held that the accused was not a member of the "civilian component" within the meaning of the Administrative Agreement with Japan (Pet. Br. 16-25, No. 713), but upheld court-martial jurisdiction under Art. 2(11) none the less. If, as appellant here now urges, power to try civilians rests on the treaty power, the *Robertson* case necessarily must have been decided the other way.

(ii) In *United States* v. *Weiman*, 3 USCMA 216, 11 CMR 216, the two accused were Polish nationals, employed by the United States Army in Germany, and brought to France as members of a Labor Service Company. They were not enlisted men and consequently their status was that of "retainers to the camp" within Art. 2(11), UCMJ, not that of soldiers.

Court-martial jurisdiction was sustained. A secret security agreement with France, referred to in the court's opinion (pp. 219-220), is said to have "contemplated" the exercise of military jurisdiction over persons in the category of the accused. It is, of course, impossible to argue with an unseen document, but, even so, just how the treaty power authorizes trial by American court-martial of Polish nationals in France, on the assumption that such authority cannot be found in Clause 14 of Article I, Section 8, requires more explanation than is found in appellant's brief.

(iii) In *United States* v. *Eunice M. Brillhart*, CM 376967, no opinion, petition for grant of review denied June 13, 1955 (USCMA No. 6774), the accused, the wife of an American sergeant, was a British subject. She was tried by an Army court-martial in Eritrea for offenses committed in Eritrea, viz., the premeditated murder of three infant children. As a British subject, she could have been tried by a British court, in view of Sec. 9 of the Offences against the Person Act, 1861 (St. 24 & 25 Vict., c. 100), and before that tribunal, by reason of the provisions of the Infanticide Act, 1938 (St. 1 & 2 Geo. VI, c. 36), she would have been subject to far less severe penalties than the life sentence adjudged by the U. S. Army court-martial and later affirmed without modification.

Under the provisions of 8 U. S. C. § 1182(a)(9), Mrs. Brillhart, who, plainly, had been convicted of a crime involving moral turpitude, was an alien whom Congress had by law excluded from admission into the United States. She was in fact brought into this country pursuant to 8 U. S. C. § 1182(d)(5), which provides that "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest * * *." At present, therefore, Mrs. Brillhart is confined in the Federal Reformatory for Women at Alderson for the term of her natural life.

It would be interesting to learn just what aspect of the treaty power was exerted to put her there.

The short of the matter is that, in fact, the armed forces have relied, for their subjection of civilians overseas to military jurisdiction, on the terms of AW 2(d) and Art. 2(11), UCMJ; that they assumed, however mistakenly, that the only test was whether the particular case was one "arising in the land or naval forces" within the Fifth Amendment, which they regarded as a grant of power; and that military trials of civilians overseas were never sought to be supported as an exercise of the treaty power before appellant filed his Statement as to Jurisdiction in this case in February of the present year.

Omission of any reference to the treaty power in the pleadings here and in the *Krueger* case (R. 6-8, No. 713) was accordingly neither accidental nor inadvertent.

B. The British Statute Known as the United States of America (Visiting Forces) Act, 1942, Did Not Purport to Enlarge the Jurisdiction of American Courts-Martial

But the argument based on the treaty power is not only an afterthought, it is a very poor afterthought. Examination of the international agreement relied upon affords no assistance to appellant in his quest for court-martial jurisdiction.

1. The mountain of the treaty power to which appellant points yields forth simply the mouse of an exchange of notes, both dated July 27, 1942, between the British Foreign Secretary and the American Ambassador to Britain (U. S. Br. 74-78). That exchange, succinctly stated, is to the effect that, during World War II, American servicemen in Britain shall be tried by American courts-martial.[66]

[66] Reciprocal arrangements for the trial of British servicemen in the United States by British courts-martial were made by the Act of June 30, 1944, c. 326, 58 Stat. 643 (22 U. S. C. §§ 701-706), and Proclamation No. 2626, Oct. 12, 1944, 9 Fed. Reg. 12403.

Nothing whatever in either note deals with civilian dependents of American servicemen—a not unreasonable omission, as dependents did not in July 1942 or for some years thereafter accompany the American forces in or to England. Yet, if appellee's trial by court-martial is to be supported by the treaty power, the agreement effected by the exchange of notes is the rock on which appellant must build his case.

2. The United States of America (Visiting Forces) Act, 1942, was the Act of the British Parliament which gave effect to the foregoing agreement. To the extent that it varied the terms of the agreement, it may well be deemed invalid so far as the United States is concerned, being unilateral. But it is not necessary to pursue that inquiry, for the reason that nothing in the statute purports in any way to enlarge the jurisdiction of American courts-martial.

Section 2(1) of the Act (U. S. Br. 76) provides:

> "For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:
>
> "Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom."

That is to say, the basic British law was[67] that anyone

[67] Following the ratification of the NATO Status of Forces Treaty, TIAS 2846, 4 U. S. Treaties 1792, the British Parliament enacted the Visiting Forces Act, 1952, St. 15 & 16 Geo. VI & 1 Eliz. II, c. 67. Section 18 of which repealed the United States of America (Visiting Forces) Act, 1942. The Visiting Forces Act, 1952, went into effect on June 12, 1954, and became effective as to the United States on the same day. See Visiting Forces Act,

who as a matter of American law is subject to American military jurisdiction is as a matter of British law likewise subject to American military jurisdiction. The definition in the British Act, therefore, leaves entirely open the issue here, which is whether appellee, as a matter of American law—including, obviously, American constitutional law—*is* subject to military jurisdiction. Consequently, for appellant to argue that the grant of court-martial jurisdiction is broadened by the Visiting Forces Act of 1942 is to argue in a particularly unprofitable circle.[68] But, in fact, appellant's arguments based on the British Act of 1942 (U. S. Br. 53-57) never face up to the actual provisions of that statute, and never even seek to explain just how the agreement underlying the British enactment enlarges the classes of Americans who, but for such agreement, would not be triable by court-martial.

Indeed, far from enlarging the categories of persons who could be tried by American courts-martial, the effect of the quoted proviso to Sec. 2(1), *supra*, p. 98, was to exclude from American military jurisdiction any British subjects employed in the United Kingdom to work for the United States forces there, and to preclude the application to them of the terms of AW 2(d) of 1920 within which they were literally embraced.

It was this limitation—among others—that was, as has been noted above, pp. 57-58, 93-94, responsible for the addition to Art. 2(11), UCMJ, of its present opening clause, viz., "Subject to the provisions of any treaty or agreement to

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1952 (Commencement) Order, 1954; Visiting Forces (Designation) Order, 1954.

Under the later legislation, which conforms to the NATO Status of Forces Treaty, American servicemen of course no longer enjoy complete extraterritoriality.

[68] Apparently appellant does not contend that the certificate of Colonel Gillem, USAF (R. 130), to the effect that appellee was subject to American military law, is to be regarded as conclusively establishing such subjection.

which the United States is or may be a party or to any accepted rule of international law."

3. The result is that appellart, notwithstanding his invocation of the treaty power, has failed to point to any treaty or executive agreement which in this case purported to enlarge the grant of court-martial jurisdiction that is now narrowly circumscribed by Clause 14, Section 8, Article I, of the Constitution.

C. No Exercise of the Treaty Power Could Authorize the Trial of a Civilian by Court-Martial in the District of Columbia

But for the circumstance that the argument is actually made by appellant, one could not have supposed it would ever be contended that, by virtue of the treaty power, a civilian could be tried by court-martial within the District of Columbia.[69]

But since the argument is made, it will be answered.

1. Assuming *arguendo* that appellant has been able to point to a treaty or agreement which purports to enlarge the power to try civilians by court-martial, the short answer is that an such exertion of the treaty power would be invalid as applied to this appellee at this time.

Not only the Sixth Amendment, but also Section 2 of Article III guarantee the right of trial by jury. Those provisions are fully applicable to civilians in the District of Columbia. Therefore any treaty that attempted to abridge that right could not be given effect, since even the treaty power, "like every other governmen l power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

[69] Since all the events now under consideration occurred in time of peace, and since appellee was not charged with any violation of the law of war, *Ex parte Quirin*, 317 U. S. 1, is obviously irrelevant.

Indeed, only at the last Term, the present Solicitor General urged on this Court the existence of those very limitations on the treaty power. He said in *United States* v. *Capps*, 348 U. S. 296 (U. S. Br., No. 14, Oct. T. 1954, p. 32):

> "The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country."

And again (*id.*, p. 49):

> "Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

Appellee heartily agrees with the quoted propositions—which, plainly, control the present case, and which completely demolish the contentions now advanced as to why, because of the treaty power, she may be tried by court-martial in the District of Columbia.

2. Reliance is placed on *Neely* v. *Henkel*, 180 U. S. 109. But, as explained above, pp. 72-73, that case simply upheld Neely's extradition to Cuba, then under American military occupation following the Spanish War, to be tried there, by an American military commission, for an offense committed there. In that case, the military commission was an American military government tribunal, functioning as an instrumentality of the American military government of Cuba.

Neely v. *Henkel* most certainly did not hold that Neely could have been tried by an American military commission in the Southern District of New York, from whence he was extradited. Yet the case must go to those lengths if it is to help appellant here.

The net of the foregoing is that appellant's trial counsel were well advised not to invoke the treaty power below.

V. TO THE EXTENT THAT APPELLANT'S INVOCATION OF THE NECESSARY AND PROPER CLAUSE BRINGS THE MATTER INTO THE REALM OF JUDGMENT, EXAMINATION OF THE REALITIES OF TRIAL BY COURT-MARTIAL DEMONSTRATES THAT THE PRINCIPLE OF "THE LEAST POSSIBLE POWER ADEQUATE TO THE END PROPOSED" IS ONE PREEMINENTLY APPLICABLE TO THE SCOPE OF MILITARY JURISDICTION

As has been noted above, page 39, *Toth* v. *Quarles*, 350 U. S. 11, held that the grant of court-martial power is not to be broadly construed by reason of anything in the Necessary and Proper Clause of the Constitution. Nothing daunted, appellant now invokes that clause in an attempt to establish that it is necessary to try civilians overseas by court-martial in time of peace (U. S. Br. 30, 48). But inquiry into the realities of military jurisdiction show that, in fact, such trials are neither necessary nor proper.

A. Appellant Fails to Make Out a Case of Factual Necessity Requiring Military Trials of Civilians in Time of Peace

Appellant's case for the supposed necessity of trying accompanying civilians in time of peace is just another instance of a theory wrecked by the stubbornness of facts.

To begin with, as has been demonstrated at length, pp. 61-64, *supra*, no dependent wife was ever tried by an Army court-martial from 1775 to 1950, and no civilians, other than in time of war and in the field, were ever tried by court-martial with the approval of higher authority prior to 1941.[70] If experience has been the life of the law, then, pretty plainly, a power dormant and never ex-

[70] The purported courts-martial of Soldiers' Home inmates, noted by Winthrop at *143 (reprint, p. 105), can hardly qualify as exceptions. And see Dig. Op. JAG, 1912, p. 1010, ¶ I; *id.*, p. 1012, ¶ II, holding unconstitutional and a dead letter statutes purporting to subject such inmates to the Articles of War.

ercised during the better part of two centuries hardly spells out any very pressing necessity.

Next, as has also been shown, pp. 88-89 *supra*, the United States has many other civilian employees presently employed in foreign countries who are not subject to the Uniform Code, employees apparently as numerous as those paid out of Department of Defense appropriations. Presumably those other civilians are accompanied by their dependents. And yet the inability to try that large non-military group of Americans by court-martial has not evoked the contention (U. S. Br. 29-31, 37-39, 47-48, 50-51, 64-65; *Burney* Appendix, pp. 75-78) that necessity requires confirmation of the power now asserted.

Finally—although it is really not up to appellee to propose a solution—ample constitutional, and entirely practicable means are at hand to try persons in appellee's position.

First. As has been shown by reference to the actual figures, *supra*, pp. 90-91, serious offenses by accompanying civilians arise very infrequently.

Insofar as such offenses are committed against foreign nationals, such American civilians—like American servicemen similarly situated—are now subject to trial in foreign courts. Article VII 3(b) of the NATO Status of Forces Treaty, TIAS 2846, 4 U. S. Treaties 1792, 1800; Paragraph 3(b), Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U. S. Treaties 1846, 1848.[71]

Insofar as such offenses are committed against American civilians, as here and in No. 713, then Congress can provide for the trial of such offenders in the first American judicial district to which they are brought. 18 U. S. C. § 3238. This is the traditional forum for offenses com-

[71] Old Article XVII (Pet. Br. 20-24, No. 713; *Burney* Appendix, pp. 81-82) is no longer in force—a matter overlooked in *Burney*.

mitted by Americans on the high seas or within the admiralty jurisdiction (*United States* v. *Flores*, 289 U. S. 137) or in uninhabited territory (*Jones* v. *United States*, 137 U. S. 202) or for offenses that can be committed anywhere (*United States* v. *Bowman*, 260 U. S. 94; *Blackmer* v. *United States*, 284 U. S. 421).

It is argued that such trials are wholly impracticable because of the difficulties of transporting witnesses to the appropriate American forum (U. S. Br. 51; *Burney* Appendix, pp. 54, 84-86). But such a defeatist attitude underestimates the resourcefulness of those who prosecute in the name of the United States. Droves, if not indeed clouds, of witnesses were successfully transported to the United States from Europe and from Asia to testify at the post-war treason trials of many American citizens. *Chandler* v. *United States*, 171 F. 2d 921 (C.A. 1), certiorari denied, 336 U. S. 918; *Best* v. *United States*, 184 F. 2d 131, (C.A. 1), certiorari denied, 340 U. S. 939; *Gillars* v. *United States*, 182 F. 2d 962 (D.C. Cir.); *Burgman* v. *United States*, 188 F. 2d 637 (D.C. Cir.), certiorari denied, 342 U. S. 838; *D'Aquino* v. *United States*, 192 F. 2d 338 (C.A. 9), rehearing denied, 203 F. 2d 390, certiorari denied, 343 U. S. 935. And, just the other day, the Department of Justice announced the arrival in Washington of 18 witnesses flown from Italy to testify in a perjury trial growing out of the Holohan murder case.[72]

But, it is said, foreign nations will be reluctant to release American civilian offenders to be tried in American civilian courts (U. S. Br. 46, 49, 50-51, 64-65; *Burney* Appendix, pp. 58, 80).

The fear expressed is largely imaginary, for several reasons.

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[72] "18 Italians To Testify at Icardi Trial", Washington *Post*, April 9, 1956, p. 3; "18 Arrive Here for Icardi Trial", *The Evening Star*, April 9, 1956, p. A-14. See *In re Lo Dolce*, 106 F. Supp. 455 (W. D. N. Y.).

(i) Once the foreign nation relinquishes jurisdiction, it will be a matter of indifference to it whether the accused is tried by a military or a civil tribunal of the United States. And surely the good faith of the United States affords ample assurance that such an accused will not simply be turned loose once he—or she—is returned to American soil.

(ii) The civil jurisdiction discussed under the present heading is one which, as this Court has said (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356), is based on "the old notion of personal sovereignty." See also *Skiriotes* v. *Florida*, 313 U. S. 69, 73-74. Such a jurisdiction is presently provided for in England by the Offences against the Person Act, 1861, *supra*, p. 96, which makes homicide committed by a British subject anywhere in the world triable in a British court, and has in fact long been exercised there under predecessor statutes. E. g., *Regina* v. *Azzopardi*, 1 Car. & K. 203 (1843).

When and if Congress enacts a similar statute, such an extension of jurisdiction will hardly be deemed to have an irrational basis, and requests for delivery thereunder of offenders not subject to the primary jurisdiction of the host state will no doubt be sympathetically received. Indeed, it may be ventured that few foreign nations friendly enough to permit us to station our troops on their soil in time of peace will insist on their theoretical right to try an American woman for an offense committed by her against another American.

What the Court said in *Toth* v. *Quarles*, 350 U. S. at 21, of trials of civilian ex-servicemen is fully applicable to the trial of civilian dependents of servicemen: "There can be no valid argument therefore, that civilian ex-servicemen

Second. It is insisted (*Burnett* Appendix, pp. 79, 82) that the only alternative to the trial of accompanying civilians by court-martial is to force them into foreign courts. Apart from the circumstances that, as has been shown, there are other alternatives, and that, as has also been shown, such civilians are now in fact subject to trial by foreign courts for many of their misdeeds, the implication of the argument, that trial in foreign courts is somehow the ultimate horrible, that it is actually (*Burnett* Appendix, p. 79) "unpalatable", will not survive analysis.

It is only necessary, under this heading, to refer to the extensive testimony of representatives of the Departments of State, Defense, and Justice, given only last summer, all of it to the effect that the relinquishment of jurisdiction over Americans to the courts of the NATO countries is working satisfactorily. See *Status of Forces Agreements*. Hearings before the House Committee on Foreign Affairs, 84th Cong., 1st sess., on H. J. Res. 309 and similar measures, at pp. 160-374.

Third. So far as American civilian employees of the armed forces are concerned, they must either be made triable in federal district courts as above suggested, or else the Department of Defense and the Congress must make a choice between leaving them triable by foreign courts in a civilian status, or else militarizing them in order to render them amenable to trial by court-martial. After all, there is no military reason that requires stenographers, clerks, or post exchange employees to be civilians; and the Navy's Construction Battalions—the Sea Bees—were organized in response to the view that construction personnel in combat or near-combat zones are more easily and appropriately controlled if they have full military status. If it is true that accompanying civilians must imperatively be subjected to military discipline (U. S. Br. 38-39; *Burnett* Appendix, pp. 75-79), then, plainly, they should be sent overseas only in a frankly military status, as members of the forces.

But, it is said (U. S. Br. 29) that considerations of economy require the armed forces to rely upon civilian employees rather than soldiers, and that (*Burney* Appendix, p. 85) similar considerations of economy preclude trial of such civilians in constitutional courts.

It seems sufficient to reply to such arguments that budgetary considerations have never, certainly not until now, been recognized as valid reasons for denying constitutional rights.

At any rate, the question of how to deal with the disciplinary problems posed by the present case is for the Congress. Ample means are at hand; the considerations involved are legislative in character. All that need now be said is that, under any solution which is ultimately adopted, adherence to constitutional limitations is highly unlikely to result in the "tremendous expense, fantastic waste, cumbersome procedures and interminable delay" now so graphically if unprophetically asserted at p. 86 of the *Burney* Appendix.

B. Subjecting Civilians to Military Jurisdiction in Time of Peace Not Only Deprives Them of Their Right to Trial by Jury, But Necessarily Cuts Off Other Constitutional Protections

In *Board of Education* v. *Barnette*, 319 U. S. 624, 642, n. 19, the Court said, "The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."

At this juncture it would be well to list the "many freedoms" that are unavailable to persons subject to the Uniform Code of Military Justice.

1. To begin with, the U. S. Court of Military Appeals has held that the rights of servicemen are statutory rather

than constitutional. *United States* v. *Clay*, 1 USCMA 74, 1 CMR 74. In that case the court said (p. 77):

> "Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or other federal statutes."

Notwithstanding the last sentence of the quotation, examination of the decisions of the Court of Military Appeals discloses significant variations from constitutional norms applicable in cases arising in United States courts established under Article III.

2. Thus, despite the Eighth Amendment, bail is nonexistent in military jurisprudence. See Dig. Op. JAG, 1912, p. 481, ¶ 1 C: "Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case." And "bail" is not even an indexed topic in Winthrop. For the constitutional standard, see e.g., *Stack* v. *Boyle*, 342 U. S. 1.

3. The protection against unreasonable searches and seizures available to personnel subject to the Uniform Code is markedly narrower than in the civil courts. *United States* v. *De Leo*, 5 USCMA 148, 17 CMR 148 (search under French law; strong dissent by Latimer, J.); *United States* v. *Noce*, 5 USCMA 715, 19 CMR 11 (Sec. 605 of Communications Act (47 U. S. C. § 605) held inapplicable to military telephone systems; Latimer, J., dissenting); *United States* v. *De Leon*, 5 USCMA 747, 19 CMR 43 (same; Latimer, J., dissenting); *United States* v. *Ellwein*,

6 USCMA 25, 19 CMR 151 (confession obtained through wire-tap but conviction sustained; Latimer, J., dissenting).

4. A fairly recent military decision involving invasion of the person appears to be at sharp variance with the rule of *Rochin* v. *California*, 342 U. S. 165. See *United States* v. *Williamson*, 4 USCMA 320, 15 CMR 320 (catheterization of unconscious soldier sustained; vigorous dissent, on constitutional grounds, by Quinn, C. J.); cf. *United States* v. *Barnaby*, 5 USCMA 63, 17 CMR 63 (urine sample ordered by superior held admissible in evidence; Quinn, C. J., dissenting).

5. The Court of Military Appeals has held that the use of depositions in court-martial cases does not violate the Sixth Amendment's guarantee of the right to confront witnesses. *United States* v. *Sutton*, 3 USCMA 220, 11 CMR 220 (Quinn, C. J., dissenting on constitutional grounds).

The foregoing decisions must be read in the light of the circumstance that they are, all of them applicable to civilians tried by court-martial, regardless of occupation—and regardless of sex. Thus, in considering the consequences of subjecting civilians to military jurisdiction in time of peace, it must be borne in mind that such civilians lose more than the right of indictment by grand jury, and more than the right of trial by petty jury; they lose a host of other constitutional rights as well.

True, in the *Burney* case, Judge Latimer said (*Burney* Appendix, p. 68), "Once a person is held to be subject to military law, and he is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the Uniform Code of Military Justice, with the exception of a trial by jury and a presentment of a grand jury."

And Chief Judge Quinn said (*Burney* Appendix, p. 87), "Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our

effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law."

But the foregoing generalizations both overlook the fact that a person subject to the Uniform Code has no right to the bail guaranteed by the Eighth Amendment, nor to the confrontation guaranteed by the Sixth. And the dissents of both judges (pp. 108-109, *supra*) bear eloquent witness to the proposition that, in many significant fields, the person before a court-martial loses many rights available to one tried in a United States District Court without a jury.

Moreover—and this is most disturbing—both judges shrug off, as somehow not really deserving of discussion, the right to a jury trial. It is submitted that this precious heritage, the only individual guarantee that receives double mention in the Constitution, cannot be so lightly brushed aside. There is no need to consider the matter at length at the present juncture. But the attitude reflected seems significant.

C. The Reasons That Justify Curtailment of Individual Rights of Servicemen on the Basis of Fundamental Distinctions Between a Military and a Civilian Society Are Wholly Inapplicable to Civilians Who Accompany the Armed Forces Overseas in Time of Peace

Writing in 1879, General W. T. Sherman said (*Military Law*, 1 J. Mil. Serv. Institution of the U. S. 129, 130):

> "The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation."

Or, as Maitland put it (*Constitutional History of England*, p. 279), "This, I think, has been the verdict of long

experience, that an army cannot be kept together if its discipline is left to the ordinary common law."

And so, in many situations, the necessities of discipline and the manifold differences between a civilian and a military society, particularly when the latter is on the march, produce situations where what would be utterly unfair and unreasonable in civilian life can only be regarded as proper and wholly reasonable in a military setting.

What, for instance, is such "manifest necessity" as will justify withdrawing a case from trial without danger of a successful plea of double jeopardy? As *Wade* v. *Hunter*, 336 U. S. 684, graphically illustrates, tactical considerations in an active campaign justify steps which under more static conditions could not be sustained. Cf. Art. 44(c), UCMJ. Another example is the effect, on double jeopardy, of the disapproval of court-martial proceedings (*United States* v. *Bayer*, 331 U. S. 532, 543), or of the automatic appellate review provided for in the UCMJ (*United States* v. *Zimmerman*, 2 USCMA 12, 6 CMR 12); here too the differences in the military situation may justifiably produce difference in result. So, with the rapid moves of personnel that military operations require, denial of the prosecution's right to use depositions in court-martial cases may well require a different attitude towards the guarantee of confrontation. *United States* v. *Sutton*, 3 USCMA 220, 11 CMR 220. Other instances come readily to mind: *United States* v. *Houghtaling*, 2 USCMA 230, 8 CMR 30 (effect of escape on jurisdiction to proceed with trial of a capital case); *United States* v. *Rhodes*, 3 USCMA 73, 11 CMR 73 (reasonableness of a search in a military setting); *United States* v. *Thompson*, 3 USCMA 620, 14 CMR 38 (carrying concealed weapon as a military offense, notwithstanding Second Amendment).

But distinctions that justify restraints and restrictions to "govern armies composed of strong men" are simply in-

applicable when those sought to be affected are civilians accompanying the forces in time of peace, and are *a fortiori* inapplicable when one is dealing with dependent wives. To urge that the considerations underlying the military law apply with equal logic and with equal vigor to a dependent wife who accompanies her serviceman husband overseas certainly verges upon, if indeed it does not enter the realm of, the fatuous.

D. Even as Administered Under the Uniform Code, Military Law is Still an Essentially Rough-Hewn System of Justice

In 1916, Congress adopted, at General Crowder's urging the first real revision of the Articles of War in over a century. But, although carefully drawn and representing the culmination of years of careful study, the revision failed in the test of World War I. The 1920 revision was adopted in consequence.

Tested in the crucible of the next war, the 1920 Articles of War proved likewise deficient, and there followed in rapid succession, first the 1948 amendments to the Articles of War, and then, in 1950, the Uniform Code of Military Justice, with its capstone of a civilian court of ultimate appeal.

The UCMJ and the 1951 MCM are carefully drawn to assure every serviceman his full measure of due process of law, with, indeed, many provisions, at the very least, even suggestive of undue process. But, unfortunately, some of the tendencies against which the UCMJ was directed are still very much in evidence.

In this connection, it is to be borne in mind that, under Art. 67(b), UCMJ, the bulk of the cases coming before the Court of Military Appeals cannot come there as of right, that less than nine per cent of the petitions for review have been granted, and that in the last two calendar years, the percentage of grants was between six and seven

per cent.[73] Thus only a very small percentage of the business coming to the Court of Military Appeals is determined on the merits.

None the less, even the limited number of decisions on the merits show that command influence, that bane of military justice, the pressure to convict, coming sometimes from the commander and quite as frequently from the commander's legal adviser, is still very much present in fact, and is moreover generally not scotched below the highest appellate level—if at all. See, for illustrative cases of this tendency in various manifestations at different levels, *United States* v. *Duffy*, 3 USCMA 20, 11 CMR 20; *United States* v. *Guest*, 3 USCMA 147, 11 CMR 147; *United States* v. *Littrice*, 3 USCMA 487, 13 CMR 43; *United States* v. *Hunter*, 3 USCMA 497, 13 CMR 53; *United States* v. *Isbell*, 3 USCMA 782, 14 CMR 200; *United States* v. *Knudson*, 4 USCMA 587, 16 CMR 161; *United States* v. *Zagar*, 5 USCMA 410, 18 CMR 34.

The duties and obligations of the attorney-client relationship in a military society seem to have depended for their enforcement primarily on decisions of the Court of Military Appeals. See *United States* v. *Walker*, 3 USCMA 355, 12 CMR 111; *United States* v. *Green*, 5 USCMA 610, 18 CMR 234; *United States* v. *McCluskey*, 6 USCMA 545, 20 CMR 261. But where the Court of Military Appeals refuses to hold that military counsel has improperly represented con-

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[73] The figures through 1954 are taken from *Annual Report of the United States Court of Military Appeals for the period January 1, 1954, to December 31, 1954*, p. 16.

From May 31, 1951, the effective date of the UCMJ, through December 31, 1954, the court received 24 mandatory cases under Art. 67(b)(1)—death sentences and general officers; 180 cases on certificates under Art. 67(b)(2); and 5934 petitions under Art. 67(b)(3).

Total petitions granted were 497; total denied were 5191. For 1954, 104 petitions were granted, as against 1703 denied.

For 1955, according to the Clerk's Office, 130 petitions were granted, as against 1687 denied.

flicting interests (*United States* v. *Stringer*, 4 USCMA 494, 16 CMR 68; Quinn, C.J., dissenting), then the standard falls below the one established by this Court (*Glasser* v. *United States*, 315 U. S. 60; see, e. g., *Craig* v. *United States*, 247 F. 2d 355 (C.A. 6)).

In many of the foregoing cases, no opinion was written by the intermediate appellate tribunal, the Board of Review, Art. 66, UCMJ. And one decision by the Court of Military Appeals lends sanction to a most disturbing practice by such a Board. *United States* v. *Thomas*, 3 USCMA 798, 14 CMR 216. There only two members heard the argument and submitted their opinion.[74] Reargument was then granted before a full Board, one new member having been added. The next day, the three-man board published its second opinion, in the precise language of the original opinion. *Held*, Quinn, C. J., dissenting, that this was proper.

Other cases are still more disturbing, not only because of what they reveal, but because they are later cases, dating from a period when the Uniform Code had been in operation for a sufficiently long time to have had its guiding principles permeate the consciousness of the services.

In *United States* v. *Deain*, 5 USCMA 44, 17 CMR 44, a Rear Admiral, the president of a permanent Navy general court-martial, was challenged by the defense. On *voir dire*, he said "that as a rule, that if a case is referred for trial, that there is a likelihood that some offense has been committed", and it was testified that he had at various times been heard to say "that anyone sent up here for trial must be guilty of something." It was also shown that this Rear Admiral made out the fitness reports on the other members of the court-martial. The challenge was not sustained, accused was convicted, and a Navy Board of Review affirmed. The Court of Military Appeals reversed.

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[74] Two members of a Board of Review constitute a quorum. *United States* v. *Petroff-Tachomakoff*, 5 USCMA 824, 19 CMR 120.

In *United States* v. *Whitley*, 5 USCMA 786, 19 CMR 82, an accused was on trial before a Navy special court-martial. The president of the court made a number of rulings favorable to the defense. At a recess, he was relieved from detail as a member of the court, and another officer was substituted as president. The latter officer's rulings were more favorable to the prosecution, and accused was convicted. Held error but not prejudicial error by the Board of Review; reversed by the Court of Military Appeals.

In *United States* v. *Parker*, 6 USCMA 75, 19 CMR 201, accused was charged with several rapes, capital offenses. Art. 120, UCMJ. He was ordered to trial one day after the appointment of the court-martial and of one unassisted defense counsel, was found guilty, and was sentenced to death. An Army Board of Review affirmed. The Court of Military Appeals reversed, for inadequacy of representation.

In *United States* v. *Sears*, 6 USCMA 661, 20 CMR 377, charges against two airmen were referred to a special court-martial. One retained an English solicitor to defend him, after which three judge advocate officers were appointed as additional members of the court. Two were challenged peremptorily; under Art. 41(b), UCMJ, no further peremptory challenges were available. The third judge advocate then, during the trial, passed notes to the president of the court, advising him how to rule. A challenge of this third judge advocate for cause, then made, was not sustained; conviction followed, and an Air Force Board of Review affirmed. Reversed by the Court of Military Appeals because "the member 'joined the ranks of partisan advocates' and destroyed the accused's right to a fair trial."

In *United States* v. *McMahan*, 6 USCMA 709, 21 CMR 31, accused was charged with premeditated murder. His assigned defense counsel, a Major, made no opening state-

ment, refused to make any closing argument although there was little evidence of premeditation, and, after accused was found guilty as charged, said nothing about the sentence—as to which the court was limited to choosing between death and life imprisonment. Art. 118, UCMJ. An Army Board of Review affirmed the death sentence that the court-martial had imposed; the Court of Military Appeals reversed because of inadequacy of representation.

Truly, it takes more than an Act of Congress to inculcate a sense of justice. And any one examining the decisions listed under the present heading may well ask whether there can be any persuasive reasons for subjecting to this system of military law persons who are not strong men, persons who do not compose the fighting forces, persons who are simply unarmed women married to servicemen and living with them overseas.

E. The Record of Trial in the Present Case Bears Eloquent Witness Against the Extension of Military Jurisdiction Over Civilian Dependents

But it is not necessary to argue by example or to generalize. The very record of trial by court-martial in this case (Ex. M to Return and Answer)[75] shows with stark and compelling force just what happens when a dependent wife faces first a court-martial and then the agencies of military appellate review.

1. The only issue at the trial was whether appellee was sane when she killed her husband. Three Air Force doctors testified that she was, two to the contrary. After her conviction of premeditated murder in violation of Art. 118(1), UCMJ, and a consequent sentence to life imprisonment, two of the prosecution witnesses recanted their in-trial testimony in unsolicited affidavits (R. 142-145), and one

[75] Only a few pages of that record were printed. See R. 128-131. But the entire record, together with the post-trial affidavits (R. 136-145), was certified by the clerk of the court below and is now lodged with the Clerk of this Court.

of the defense expert witnesses, a clinical psychologist, amplified what he had earlier testified to (R. 136-142).

Captain Adelsohn, after setting forth in detail the results of his tests, diagnosed appellee's condition on the night she killed her husband as (R. 141) "psychosis, specifically, paranoid schizophrenia", and added (R. 141-142), "In either case [i.e., psychotic depression or paranoid schizophrenia], psychosis, meaning—I presume—legal irresponsibility, seems to me to have been clearly present. I disagree with a finding of neurotic depression, as that is counter-indicated by the bulk of the data I have gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board."[76]

Captain Graves, a prosecution witness at the trial, deposed in his unsolicited post-trial affidavit (R. 142) that he was hampered in his testimony by the provisions of Air Force Manual 160-42 (see pp. 118-119, *infra*) and concluded (R. 143): "There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degree of conscious participation in the planning and execution of this act to refer to it as a premeditated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice."

Lt. Col. Martin, another prosecution witness at the trial, stated that he was making his unsolicited post-trial affidavit (R. 143) because "the findings of the General Court-Martial are completely wrong." He, also, considered the provisions of Air Force Manual 160-42 to have hindered the expression of his medical views, explaining why in detail (R. 143-144). And he said (R. 144): "All of my feelings about this case can be summed up in the statement

[76] These members were the prosecution's three expert witnesses.

that I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term 'insanity', to me, means that the individual is not responsible for his or her behavior."

Yet, in the face of these three affidavits, the majority of the Air Force Board of Review in this case affirmed appellee's conviction of premeditated murder and the sentence of life imprisonment that was imposed (R. 61), saying (R. 42),

> "We are unable to find in these post trial affidavits sufficient disagreement in the opinions of affiants, as against their testimony at trial, to substantially impeach their in-court testimony to the extent that any reasonable doubt as to the sanity of the accused has been established."

The foregoing has been set forth, not in any sense to retry the issue of appellee's sanity in the present proceedings, but simply to point out to the Court how the Air Force dealt with the evidence on that issue.

2. As the opinion of the Court of Military Appeals shows (R. 97-110), appellee's conviction was reversed because the prosecution's witnesses adhered too closely to the test set forth in Air Force Manual 160-42, *Psychiatry in Military Law*. This Manual is identical with the Army's Technical Manual 8-240, which was considered in the case of Mrs. Dorothy Krueger Smith (No. 713, at R. 52-91) and in the case of *Kunak*, 5 USCMA 346, 17 CMR 346. Basically, the question on which the Court of Military Appeals divided was whether this joint Army-Air Force Manual improperly circumscribed the testimonial freedom of the military expert witnesses, when it stated (p. 5, ¶ 5c, of the 1950 edition), "If the medical officer is satisfied that the accused would *not* have committed the act had there been a civil or military policeman at his elbow, he will not testify that the act occurred as the result of an 'irresistible impulse'." Chief Judge Quinn thought that the testimony in

all three cases showed that the "he will not testify" clause bound the military medical witnesses to the exclusion of their individual professional beliefs; see his concurrence in this case (R. 111), and his dissents in *Smith* (No. 713, R. 91-94) and *Kunak* (5 USCMA at 369-374, 17 CMR at 369-374).

It is neither necessary nor appropriate to resolve those differences here. But the course of all of these recent insanity cases indicates that, in the military system, there is at least grave danger that testimony as to who is and who is not sane will be directed (p. ii of the Manuals concerned) "By order of the Secretaries of the Army and Air Force."

Is it desirable that the sanity of civilian dependents be thus determined?

3. In the District of Columbia, the traditional rules of legal responsibility have recently been recast in the light of scientific progress in psychiatry. *Durham* v. *United States*, 214 F. 2d 862 (D. C. Cir.). In the *Smith* case, the Court of Military Appeals rejected the *Durham* rule, deeming itself bound by the contrary provisions of the 1951 *Manual for Courts-Martial* (No. 713, R. 52-91). Thus if the Air Force had proceeded with its plan to try appellee by court-martial at Bolling Field in the District of Columbia in November 1955 (R. 2, 8), her sanity would have been tested by a rule different from that applied in the United States Court House, a few miles away in the same District.[76a]

4. Perhaps the most shocking manifestation of the impact of a system designed "to govern armies composed of strong men" on the case of a distraught and emotionally disturbed woman who was with child while on trial[77] is found in the sentence imposed.

[76a] For a recent penetrating critique of the "right and wrong" rule, see Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond* (1955) 41 A. B. A. J. 793.

[77] R. 20, 95; unprinted court-martial transcript, pp. 124, 277. The child was born while she was a prisoner at Alderson (R. 2, 95).

The court-martial adjudged a sentence of life imprisonment (R. 2, 5-6). Although the record disclosed extreme emotional disturbance at least on the verge of insanity—the record of trial showed that, after the fatal act, appellee climbed into the cot with the corpse of her husband and stayed there all night (R. 23, 82)—the Board of Review approved her sentence in its entirety, saying (R. 61), "Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted."

It is difficult to resist the view that such a judgment reflects vindictiveness, and that, indeed, it harks back to the ancient common law that deemed the killing of a husband by his wife not simply felony, but petty treason, and punished it, until late in the Eighteenth Century, by burning the offending woman at the stake.[78] At any rate, recent Air Force cases involving the killing of a civilian by airmen rather than, as here, the killing of an airman by a civilian, reflect a more merciful attitude towards the accused.

In his brief in the *Toth* case (U.S. Br., No. 3 this Term, p. 14, n. 3), the present Solicitor General pointed out that both of the individuals accused as accomplices of Toth had been tried and convicted—and that was the cold blooded murder of a Korean civilian, committed by persons not shown to have been emotionally disturbed in any way.

Lieutenant Schreiber, who gave the order to kill, had his sentence to life imprisonment cut to five years by the convening authority. 16 CMR at 649. It was not further cut

[78] See 4 Bl. Comm. *203-204; 1 Stephen, *History of the Criminal Law of England* (1883) 477; 2 Holdsworth, *History of English Law* (3d ed. 1927) 449. Petty treason was not reduced to murder until 1828 (St. 9 Geo. IV, c. 31, § 2), and burning was only abolished as the punishment therefor in 1790 (St. 30 Geo. III, c. 48). For the grisly details of execution prior to the statute last cited, see Radzinowicz, *A History of English Criminal Law: The Movement for Reform 1750-1833* (1948) 209-213.

by the Board of Review (16 CMR 639, 674), but, after affirmance by the Court of Military Appeals (*United States* v. *Schreiber*, 5 USCMA 602, 18 CMR 226), so appellee is advised, the prisoner was released after serving only twenty months.[79]

Airman Kinder, who pulled the trigger, had his life sentence cut to two years by the convening authority, and the execution of his dishonorable discharge suspended (14 CMR 742, 752). Appellee is advised that Kinder was released after serving fifteen months and received an honorable discharge besides (note 79; *supra*).

Yet this appellee, disturbed, distraught, legally insane by the weight of the psychiatric testimony, was sentenced to imprisonment for life. And when, after more than two years' confinement, her conviction was set aside, the Air Force insisted on retrying her (R. 8, 122, 125), and at this moment all the legal resources of the United States are mobilized and marshaled to that end.

If this is not indeed an instance of a law "fair on its face and impartial in appearance * * * applied and administered by public authority with an evil eye and an unequal hand" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374), it emphasizes at any rate the utter inappropriateness of turning over to an armed force the dispensing of justice to an unarmed woman.

The court-martial jurisdiction, then, is preeminently a field for application of the principle, first enunciated by this Court 135 years ago, which calls for limitation to "*the least possible power adequate to the end proposed.*" *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *In re Michael*, 326 U. S. 224, 227; *Toth* v. *Quarles*, 350 U. S. 11, 23; *Cammer* v. *United States*, 350 U. S. 399, 404.

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[79] And so alleged in par. 13 of the Petition, R. 3, on the basis of information obtained from Appellate Defense Counsel Division, Office of The Judge Advocate General, United States Air Force.

The experience of the armed forces since 1775, and the practice prior to 1941, join in demonstrating that the provisions of Art. 2(10), UCMJ, which subject to military jurisdiction only those civilians who, in time of war, are "serving with or accompanying an armed force in the field", are ample to meet all genuine needs of the armed forces. And both similarly join in supporting the basic proposition advanced by this appellee that the power "To make Rules for the Government and Regulation of the land and naval Forces" (Clause 14, Section 8, Article I) "does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace" (R. 3, ¶ 12*c*).

CONCLUSION

For the reasons set forth in Point I, pp. 14-21, *supra*, this appeal should be dismissed for lack of jurisdiction.

If, however, the Court assumes jurisdiction, then, for the reasons set forth in Points II to V, pp. 21-122, *supra*, the judgment below should be affirmed.

Respectfully submitted.

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APRIL 1956.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Constitutional Provisions.*

1. Section 8 of Article I provides in pertinent part:

"The Congress shall have Power * * *

"To declare War * * *

"To make Rules for the Government and Regulation of the land and naval Forces;"

2. Section 2 of Article III provides in pertinent part:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

3. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

B. *Statutes.*

1. 28 U. S. C. § 1252, as amended, provides in pertinent part:

"**§ 1252. Direct appeals from decisions invalidating Acts of Congress**

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit,

or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

2. Article of War 2(d) of 1916, 1920, and 1948 (10 U. S. C. [1926 through 1946 eds.] § 1473) was as follows:

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"

3. Article of War 12 of 1948 (10 U. S. C. [Supp. II to 1946 ed.] § 1483) was as follows:

ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

4. Article 2 of the Uniform Code of Military Justice (50 U. S. C. § 552) provides in pertinent part as follows:

"ART. 2. Persons subject to the code.

"The following persons are subject to this code:

* * * * *

"(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

* * * * *

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;" * *

5. Article 18 of the Uniform Code of Military Justice (50 U. S. C. § 578) provides:

"ART. 18. Jurisdiction of general courts-martial.

"Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."